(1)

No. 89-5867-CFX
Status: GRANTED

Title: Shirley W. Irwin, Petitioner
v.
Veterans Administration, et al.

Docketed:
October 10, 1989

Court: United States Court of Appeals
for the Fifth Circuit

Counsel for petitioner: Ker,Jon R.

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Oct 10 1989	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
4	Dec 11 1989		Order extending time to file response to petition until January 5, 1990.
5	Dec 27 1989		Brief of respondent Veterans Administration in opposition filed.
6	Jan 18 1990		DISTRIBUTED. February 16, 1990
8	Feb 20 1990		Petition GRANTED.
			**********
10	Feb 26 1990		Order extending time to file brief of petitioner on the merits until April 20, 1990.
11	Feb 26 1990	G	Motion of petitioner for appointment of counsel filed.
12	Mar 6 1990		Record filed.
		*	2 vol. from USCA 5.
13	Mar 19 1990		Motion for appointment of counsel GRANTED and it is ordered that Jon R. Ker, Esquire, of Hewitt, Texas, is appointed to serve as counsel for the petitioner in this case.
14	Apr 20 1990		Brief amicus curiae of National Treasury Employees Union filed.
16	Apr 20 1990		Joint appendix filed.
15	May 7 1990	D	Motion of National Treasury Employees Union for leave to participate in oral argument as amicus curiae and for divided argument filed.
17	May 9 1990		Brief of petitioner Shirley W. Irwin filed.
18	May 21 1990		Motion of National Treasury Employees Union for leave to participate in oral argument as amicus curiae and for divided argument DENIED.
19	May 24 1990		Brief of respondents Veterans Administration, et al. filed.
20	Jul 2 1990		CIRCULATED.
21	Jul 12 1990	X	Reply brief of petitioner Shirley W. Irwin filed.
22	Jul 23 1990		SET FOR ARGUMENT MONDAY, OCTOBER 1, 1990. (4TH CASE)
23	Sep 4 1990	D	Motion of petitioner for divided argument filed.
24	Oct 1 1990		Motion of petitioner for divided argument DENIED.
25	Oct 1 1990		ARGUED.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

CASE No. 5867

(2)

IN THE

SUPREME COURT

OF THE

UNITED STATES OF AMERICA

OCTOBER 1989 TERM

ORIGINAL

SHIRLEY W. IRWIN,

PETITIONER

V.

VETERAN'S ADMINISTRATION, AN OFFICIAL AGENCY OF THE UNITED STATES OF AMERICA, IRVIN D. NOLL, ROBERT L. CIMBER, CHARLES STENSLIE, AND JAMES STRONG, INDIVIDUALS,

RESPONDENTS

ON WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

COMES NOW PETITIONER, Shirley W. Irwin, and files this, his Motion for Leave to Proceed in this Court in forma pauperis, and for good cause would show unto the Court

1. Petitioner files commensurate with this Motion his affidavit in form prescribed by Federal Rules of Appellate Procedure, Form 4.

2. Petitioner does not have the financial capacity to prepay fees, costs or security therefor in accordance

with the statements contained in Petitioner's Affidavit.

3. Petitioner did not seek leave in any Court below to proceed in forma pauperis.

4. Additionally attached hereto in support of this Motion is the Affidavit of Jon R. Ker, Attorney herein.

WHEREFORE, premises considered, Petitioner prays leave from this court to proceed herein in forma pauperis.

Respectfully submitted,

JON R. KER, Attorney
P.O. Box 1087
Hewitt, TX 76643

Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on October 10, 1989, true and correct copies of the foregoing Motion for Leave to Proceed In Forma Pauperis, have been mailed to the Solicitor General, Department of Justice, Washington, D.C. 20530 by certified mail, return receipt number P#577 904 111 and a true and correct copy has been forwarded to opposing counsel by certified mail, return redeipt #P141 598 903.

JON R. KER

CASE NO. _____

IN THE
SUPREME COURT
OF THE
UNITED STATES OF AMERICA
OCTOBER 1989 TERM

89-5867

ORIGINAL

SHIRLEY W. IRWIN,

PETITIONER

V.

VETERAN'S ADMINISTRATION, AN OFFICIAL AGENCY OF THE UNITED STATES OF AMERICA, IRVIN D. NOLL, ROBERT L. CIMBER, CHARLES STENSLIE, AND JAMES STRONG, INDIVIDUALS,

RESPONDENTS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS

I, Shirley W. Irwin, being first duly sworn, depose and say that I am the Petitioner in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that:

A. In the proceedings below I borrowed from family members in order to pay for the fees and costs in those proceedings. I have again attempted to borrow from my family concerning this petition for writ of certiorari but without success. Because of my present debts and low earnings, I am not able to obtain a loan from commercial lending institutions.

B. My current monthly expenses, including repayment of loans to family members, exceed my current monthly income. The total of my debts, including that borrowed from family members is $10,750.00 for which my monthly payments are $128.00 for credit union payment plus whatever can be paid to family members for repayment of personal loans, which, to date, has been nil. The total of my living expenses per month is approximately $1,077.00, including $200 for rent, $150 for utilities, $500.00 for food, gasoline, and vehicle maintenance and incidentals, $65 for medicare and health insurance, and $34 on insurance on vehicles. I incur on a frequent, but not regular basis, expenses related to medical treatment which further depletes my funds.

C. The only property I have, apart from household goods and personal effects and personal clothing, are two old vehicles identified below. I use the truck in my employment primarily. I use the automobile for personal use. I state further that because of my age and handicap the keeping of two vehicles is necessary in the event of emergency to assure that one is in working order at all times.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed?

Yes.

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

H & H Plastics, $235 per week, 2507 W. Adams, Temple, Texas. Received raise within past month raising weekly income from $216.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

Yes.

a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

Civil service retirement, $230 per month.

3. Do you own any cash or checking or savings account?

Yes.

a. If the answer is yes, state the total value of the items owned.

Savings - $30.00

Checking - Usually less than $50 and not more than $200

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

Yes.

a. If the answer is yes, describe the property and state its approximate value.

1975 Ford p/u - $300

1979 Chevrolet - $750

5. List the persons who are dependent upon you for support and state your relationship with those persons.

None other than myself.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

SHIRLEY W. IRWIN

SUBSCRIBED AND SWORN TO before me this 10th day of October, 1989.

Notary Public, State of Texas

Let the applicant proceed without prepayment of costs or fees or the necessity of giving security therefor.

SUPREME COURT JUSTICE

CASE NO. _____ 89-5867

ORIGINAL

IN THE

SUPREME COURT

OF THE

UNITED STATES OF AMERICA

OCTOBER 1989 TERM

SHIRLEY W. IRWIN,

PETITIONER

V.

VETERAN'S ADMINISTRATION, AN OFFICIAL AGENCY OF THE UNITED STATES OF AMERICA, IRVIN D. NOLL, ROBERT L. CIMBER, CHARLES STENSLIE, AND JAMES STRONG, INDIVIDUALS,

RESPONDENTS

ON WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI

JON R. KER
P.O. BOX 1087
HEWITT, TEXAS 76643

ATTORNEY FOR PETITIONER

QUESTIONS PRESENTED

1. WHETHER THE THIRTY DAY PERIOD FOR FILING SUIT FOR FEDERAL EMPLOYEES PURSUANT TO 42 U.S.C., SUBSECTION 2000E-16 IS AN ABSOLUTE JURISDICTIONAL REQUIREMENT, OR, AS IN NONFEDERAL EMPLOYMENT DISCRIMINATION CASES, IN THE NATURE OF A STATUTE OF LIMITATIONS SUBJECT TO EQUITABLE TOLLING?

2. WHETHER RECEIPT OTHER THAN ACTUAL RECEIPT BY A CLAIMANT OR A CLAIMANT'S ATTORNEY OF THE NOTICE OF FINAL ACTION ISSUED BY THE EEOC IS SUFFICIENT FOR INITIATING THE RUNNING OF THE THIRTY-DAY FILING REQUIREMENT APPLICABLE TO FEDERAL EMPLOYEES UNDER 42 U.S.C., SUBSECTION 2000E-16(C).

LIST OF ALL PARTIES

Shirley W. Irwin, Petitioner

Veteran's Administration, an official agency of the United States of America

Irvin D. Noll

Robert L. Cimber

Charles Stenslie

James Strong, Respondents

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The decision of the United States Court of Appeals for the Fifth Circuit was reported as follows:

Irwin vs. Veterans Administration, et al
874 F.2d 1092 (5th Cir., 1989)

STATEMENT OF JURISDICTION

The Judgment of the Court of Appeals sought to be reviewed was entered June 13, 1989. Petitioner timely filed his Petition for Rehearing in the Court below, which petition was denied July 13, 1989. Petitioner thereafter filed his Motion for Leave to File Second Petition for Rehearing with Suggestion for Rehearing En Banc, which motion was denied by the Court of Appeals. This Court has discretionary jurisdiction over this cause by virtue of **28 U.S.C., Subsection 1254(1)**. This cause also involved a federal question under **42 U.S.C., Subsection 2000e-16**.

STATUTORY PROVISION INVOLVED IN THIS CASE

The pertinent and relevant provisions of **42 U.S.C., Subsection 2000e-16(c)** are as follows:

> Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection 717(a) [subsec. (a) of this section], or by the Civil Service Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Civil Service Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 706 [**42 U.S.C., Subsection 2000e-5**], in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

Civil Rights Act of 1964 Subsection 717(c), as amended, **42 U.S.C., Subsection 2000e-16(c)**.

STATEMENT OF THE CASE

This case was brought against the Veterans Administration pursuant to **42 U.S.C., Subsection 2000e-16** by one of its employees claiming discrimination on the basis of age and handicap, as well as for retaliation for his seeking redress for past acts of discrimination by the agency. Irwin also sought actions against individual named defendants under **42 U.S.C., Sections 1985 and 1986**. Further, Irwin alleged that his constitutional rights under the First and Fifth Amendments had ben violated by the individual Defendants.

(i) COURSE OF THE PROCEEDINGS

This case was dismissed by the District Court by two separate orders of dismissal involving all of Appellant's claims. From these orders of dismissal Irwin appealed. The Fifth Circuit Court of Appeals held that the filing period stated in **42 U.S.C., Subsection 2000e-16** was an absolute jurisdictional requirement and receipt at the office of Petitioner's attorney, rather than actual receipt of notice by the claimant or his attorney personally, began the running of the 30-day period for filing a complaint under Title VII. The Court below also determined that Irwin did not sufficiently plead claims under **Sections 1985 and 1986** distinct from Title VII so as to maintain actions against the individual defendants, and that the District Court did not have jurisdiction over the age discrimination claim since it was not recorded by the EEO Counsellor that Irwin filed a formal age discrimination complaint against his agency. Irwin here does not challenge the decision concerning claims under **Sections 1985 and 1986**, or the constitutional claims.

(ii) STATEMENT OF THE FACTS

For clarity, Petitioner includes here a synopsis of transactions leading up to the filing of Petitioner's complaint:

Petitioner, a handicapped former employee of the

Veterans Administration Medical Center, Waco, Texas, while employed had administratively registered complaints of improper conduct and wrongdoing by certain employees at the VAMC. As a result of these complaints of wrongful conduct by others, efforts were made by the individual defendants to obtain Irwin's voluntary retirement by offering him the alternatives of early retirement or termination. Based upon information supplied to Irwin respecting the amount of retirement pay he would receive, which representation proved false and misleading, Irwin retired. When the anticipated retirement receipt proved not forthcoming, Irwin appealed to the Merit Systems Protection Board his retirement decision. It was found that Irwin's retirement had been involuntarily made. The Merit Systems Protection Board set aside his retirement and reinstatement of employment was ordered.

When Irwin returned to work he was in short order terminated, with a termination date of April 17, 1986. Irwin, on the day of his termination, began attempts to locate and contact the EEO Counselor and an appointment was made by the Counselor for a time after 30 days from Irwin's termination. The EEO Counsellor set an appointment for Irwin for June 23, 1986. Irwin thereafter filed his appeal through the EEOC which entered its decision on March 19, 1987 dismissing the appeal for failure to contact the EEO Counselor within 30 days from the event of discrimination.

Notice of the decision by the EEOC was received by the office of Jon R. Ker, attorney for Irwin on March 23, 1987. However, on March 22, 1987, Mr. Ker had departed his office and Waco, Texas for active duty with his U. S. Army Reserve Unit for training within the Republic of Korea. Actual notice of the EEOC's final action was not had by Ker until April 10, 1987. Irwin's attorney is a sole practitioner. Irwin filed his affidavit in response to the Trial Court's request indicating to Irwin's best information he received the notice from EEOC on April 7, 1987. Suit was filed in the United

States District Court for the Western District of Texas on May 6, 1987, within thirty days of actual receipt by Irwin and Attorney Ker of the Notice of Right to Sue of the EEOC, but more than thirty days after receipt at the office of Attorney Ker.

ARGUMENT AND AUTHORITIES

I

WHETHER THE THIRTY DAY PERIOD FOR FILING SUIT FOR FEDERAL EMPLOYEES PURSUANT TO 42 U.S.C., SUBSECTION 2000E-16 IS AN ABSOLUTE JURISDICTIONAL REQUIREMENT, OR, AS IN NONFEDERAL EMPLOYMENT DISCRIMINATION CASES, IN THE NATURE OF A STATUTE OF LIMITATIONS SUBJECT TO EQUITABLE TOLLING?

The decision of the Fifth Circuit below conflicts with the decisions of other circuits on the issues of (i) whether the filing period contained in 42 U.S.C., Subsection 2000e-16(c) is an absolute jurisdictional limit, or more in the nature of a statute of limitations subject to equitable tolling, and (ii) what event of receipt of notice of the final action by the EEOC in federal employee discrimination actions triggers the running of the thirty-day period.

In its opinion, the Fifth Circuit continued to follow the distinction it had previously drawn between federal employee discrimination suits and those involving nonfederal employees regarding the question of jurisdictional character of the thirty-day limit for filing. The Court of Appeals held that the thirty-day provision of Subsection 2000e-16(c) operates as an absolute jurisdictional limit. Irwin vs. Veterans Administration, 874 F.2d 1092 (5th Cir., 1989). See also Bell vs. Veterans Administration Hospital, 826 F.2d 357 (5th Cir., 1987); 553 Eastland vs. Tennessee Valley Authority, F.2d 364 (5th Cir., 1977), cert. denied, 443 U.S. 985, 98 S.Ct. 611, 54 L. Ed. 2d 479 (1977).

The holding by the 5th Circuit in Irwin conflicts with the holdings in the Tenth, Eleventh and D.C. Circuits on the

issue of characterizing the time limits in discrimination actions. See Martinez vs. Orr, 738 F.2d 1107 (10th Cir., 1984); Milam vs. U.S. Postal Service, 674 F. 2d 860 (1982); Saltz vs. Lelhman, 672 F.2d 207 (D.C. Cir., 1982).[1]

The decisions of the Circuits disagreeing with the 5th Circuit rely upon this Court's holding in Zipes vs. Trangworld Airline, 455 U.S. 385, 102 S. Ct. 1127 (1972). They found that the Zipes rationale applies equally to the thirty-day provision of **Subsection 20003-16** as it does to the longer period pursuant to **Subsection 2000e-5(f)(1)**.[2]

The Supreme Court should now address this issue so that there be uniformity among the circuits concerning federal discrimination claimants. Applying Zipes and Baldwin County to suits by federal employees would be consistent with the remedial nature of the Act and of liberally construing the statute in favor of those protected by it. The Tenth Circuit identified this principle in its holding in Martinez:

> "We believe the decisions of the Eleventh and D. C. Circuits represent the better view. Section 2000e-16 was added to the Act in 1972 in order to correct the 'entrenched discrimination in the Federal service' and to insure 'the effective application of uniform, fair and strongly enforced policies.' H.R. Rep. No. 238, 92d Cong., 2d Sess., reprinted in 1972 U.S. Code Cong. & Ad. News 2137, 2159. The legislative history of the amendment indicates that in extending the coverage of Title VII to federal employees, Congress intended to give them essentially the same rights and remedies as had been provided employees in the private sector. (citations omitted)." Martinez vs. Orr, 738 F.2d at 1110.

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[1] The Sixth Circuit in dicta indicated that the 30-day time limit, as in question here, is subject to equitable tolling, thus not jurisdictional. See Boddy vs. Dean, 821 F.2d 346-350, (6th Cir., 1987) citing Leake vs. University of Cincinnati, 605 F. 2d 255 (6th Cir., 1979) and Harris vs. Walgreen's Distribution Center, 456 F.2d 588 (6th Cir., 1982)

[2] This Court since Zipes directly addressed the question of the filing limit being non-jurisdictional in the private sector in Baldwin County Welcome Center vs. Brown, 466 U.S. 147; 104 S. Ct. 1723, 80 L. Ed. 2d 196 (1984) (per curiam). Because the purposes under **Subsection 2000e-16** are the same as those under **Subsection 2000e-5**, the eradication of invidious discrimination in the work place, there are not sufficient cognizable distinctions between public and private employment actions to warrant differing treatment predicated upon a jurisdictional/nonjurisdictional basis.

Where, as here asserted, the stated time limit is not a jurisdictional prerequisite, it is subject to equitable tolling. In the case under consideration such a finding now by this Court would promote the remedial nature of the Act where the statutorily shorter time limit was made even shorter by the Fifth Circuit's application of constructive notice. By finding that the filing period is not jurisdictional, the federal Title VII claimant would be protected from losing his action by virtue of fortuitous circumstances.

II

WHETHER RECEIPT OTHER THAN ACTUAL RECEIPT BY A CLAIMANT OR A CLAIMANT'S ATTORNEY OF THE NOTICE OF FINAL ACTION ISSUED BY THE EEOC IS SUFFICIENT FOR INITIATING THE RUNNING OF THE THIRTY-DAY FILING REQUIREMENT APPLICABLE TO FEDERAL EMPLOYEES UNDER 42 U.S.C., SUBSECTION 2000E-16(C).

The issue of the application of the doctrine of constructive receipt for purposes of determining the triggering event for the running of the filing period under **Subsection 2000e-16** has likewise resulted in conflicting opinions among the circuits.

In Irwin the Fifth Circuit relied upon its decision in Ringgold vs. National Maintenance Corp., 796 F.2d 769 (5th Cir., 1986), a private employee action subject to the longer period for filing suit, to hold that constructive notice applied from time of receipt of the notice of right to sue letter at the claimant's attorney's office rather than from the time of actual receipt by the claimant or claimant's attorney. That Court applied Ringgold even though it had in a prior decision agreed with the results in cases from the Sixth, Eighth and D.C. Circuits finding that notice meant the time of actual notice to the claimant. See Cooper vs. Lewis, 644 F.2d 1077 (5th Cir., 1981), citing Rea vs. Middendorf, 587 F.2d 4 (6th Cir., 1978); Craig vs. Department of Health, Education and Welfare, 581 F.2d 189 (8th Cir., 1978); and

Bell vs. Brown, 557 F.2d 849 (D.C. Cir., 1977). [3]

In this case the subject of this Petition, suit was filed within thirty days of the actual receipt of notice of right to sue issued by the EEOC, but more than thirty days after receipt at the office of Irwin's attorney, acknowledgement of receipt of which was by a nonlawyer employee. Mr. Ker is the only attorney in his office and has no other attorney sharing his office space. As stated in his affidavit to the trial court, Mr. Ker had departed Waco, Texas for temporary military duty in the Republic of Korea one day prior to receipt at his office of the notice by the EEOC. Actual notice by Ker was subsequent to actual notice by Irwin.

The policy of liberally construing remedial statutes so as to fully protect the intended class should be here applied to require actual notice to the claimant or, at least, actual notice to the claimant's representative. Nor is a different result mandated by Link vs. Wabash R. R. Co., 370 U. S. 626, 82 S. Ct., 1386, 8 L. Ed. 2d 734 (1962). Link did not involve a remedial statute, particularly one with a short period of time for filing suit and concerned actions by counsel subsequent to suit having been filed. Here the matter concerns actions prior to suit having been filed. Requiring actual notice to the **Subsection 2000e-16** claimant is similar to requiring service upon him had he been named a defendant in litigation.

Requiring that actual notice to the claimant or his representative in furtherance of protecting an intended class would not require Link to be overturned. By requiring actual

[3] The Eighth Circuit in Craig carved out an exception to actual notice to the claimant where the representative of the claimant is addressed by registered or certified letter or other notice requiring the representative to personally acknowledge receipt. This does not place an onerous burden on the EEOC in comparison to the protection of the Title VII claimant from loss by virtue of the fortuitous circumstances involved here. The Sixth and D.C. Circuits require actual receipt by the Title VII claimant to initiate the running of the thirty-day period.

notice the claimant would be protected from loss of his action due to fortuitous circumstances in the same manner as argued above.

Consider a situation where notice of right to sue is issued by the EEOC and received by the federal claimant's attorney's office, but not actually received by the attorney, and the attorney has been representing a claimant through the administrative proceedings. Consider further that the attorney is out of his office at the time the notice is received and for at least another 31 days thereafter. Moreover, consider that the federal claimant in such situation actually received notice on the 31st day after receipt by the attorney's office of the notice of right to sue. In this situation, following the rule of Irwin, the federal claimant, having been represented by the attorney through the administrative steps, is left without the ability to file suit resulting from the fortuitous event of his attorney being out of town. It is difficult to conceive that Congress, in enacting Title VII, would have intended the remedial relief afforded by the Act, to be defeated by such circumstances over which the claimant has no control. Such a harsh rule is the result under the decision of the Fifth Circuit in this case. Likewise, it is difficult to conceive that requiring personal acknowledgement by claimant's representative places an onerous burden upon the EEOC. Irwin submits that the remedial purposes intended through the Act are more correct as a background for interpreting Congress' intent than the background of **Rule 5(b), Fed. R. Civ. P.**

Under the facts of the example, if the policy of liberally construing the remedial statute to allow for the protection of the intended class be applied, the result should be that constructive notice would apply only upon the actual receipt by the attorney. The effect would be to protect the claimant without doing away with our representative system. In the example, if constructive

notice be applied at the time of actual notice to the attorney, the claimant would, after receipt of notice, still have the opportunity to obtain substitute counsel while his attorney remained away and the remedial nature of the Act would be preserved. On the other hand, where constructive notice applies other than by actual notice by the representative, then the claimant is subjected to constructive notice upon constructive notice (receipt by the representative's office without actual notice to the representative binds the representative which in turn binds the claimant even where there is no person who can initiate any action to protect the claimant from the loss of his claim).

Irwin urges this Court to address these issues and determine that in Title VII actions by federal employees, the 30-day filing period is not jurisdictional and that actual notice to claimant or his representative be the triggering event for the running of the thirty-day filing period.

Respectfully submitted,

JON R. KER, Attorney at Law
State Bar ID#1327700
P.O. Box 1087
Hewitt, TX 76643
(817) 666-1122

A P P E N D I X

Shirley W. IRWIN, Plaintiff-Appellant,

v.

VETERANS ADMINISTRATION, et al., Defendants-Appellees.

No. 88-1736.

United States Court of Appeals, Fifth Circuit.

June 13, 1989.

Terminated government employee brought Title VII action against Veterans Administration based upon claim of employment discrimination. The United States District Court for the Western District of Texas, Walter S. Smith, Jr., J., dismissed complaint, and employee appealed. The Court of Appeals, Patrick E. Higginbotham, Circuit Judge, held that: (1) triggering event starting 30-day time clock for filing Title VII employment discrimination complaint against federal government was receipt of EEOC right-to-sue letter by employee's attorney's office rather than receipt of actual notice by attorney or employee; (2) claims brought under §§ 1985 and 1986 were properly dismissed; and (3) district court did not have jurisdiction over employee's age discrimination claim.

Affirmed.

1. Civil Rights ⇐40

Triggering event for 30-day time period within which terminated government employee must file Title VII action is receipt of EEOC right-to-sue letter by office of employee's attorney; commencement of time period is not dependent upon date on which actual notice by employee or his attorney has been received. Civil Rights Act of 1964, §§ 706(e), 717(c), as amended, 42 U.S.C.A. §§ 2000e-5(f)(1), 2000e-16(c).

2. Civil Rights ⇐38

Terminated government employee failed to plead claims under §§ 1985 and 1986 which were sufficiently distinct from employment discrimination claims to avoid bar against such actions on basis that Title VII provided exclusive remedy for claims of employment discrimination filed against federal government. Civil Rights Act of 1964, §§ 701 et seq., 717(c), as amended, 42 U.S.C.A. §§ 2000e et seq., 2000e-16(c).

3. Civil Rights ⇐38

Terminated government employee's failure to file formal age discrimination complaint with his agency or give notice of his intent to sue without offering reason justifying failure to give such notice deprived district court of jurisdiction over age discrimination claim.

Appeal from the United States District Court for the Western District of Texas.

Before ALDISERT,* REAVLEY, and HIGGINBOTHAM, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

The Veterans Administration Medical Center in Waco, Texas on April 17, 1986 fired Irwin, an employee. He contacted an Equal Employment Opportunity Counselor on June 12, 1986, and later filed a complaint with the Veterans Administration. The VA rejected Irwin's claim on the ground that he failed to contact an EEO Counselor within thirty days of the alleged discrimination.[1] Irwin appealed to the Equal Employment Opportunity Commission, which affirmed the VA's decision.

Notice of the EEOC decision was delivered to the office of Irwin's attorney, and an employee of the attorney signed a receipt for the letter on March 23, 1987. At the time, the attorney was in Korea with his United States Army Reserve unit. Irwin claims that he received notice of the EEOC decision on April 7, and the attorney asserts that he first actually learned of the decision on April 10. Irwin filed this suit on May 6. The district court dismissed Irwin's complaint, and this appeal ensued.

I

We are asked to identify the triggering event which starts the thirty-day time clock for filing a Title VII employment discrimination complaint against the federal government. The statute is of little assistance, providing only that a civil action may be filed "[w]ithin thirty days of receipt of notice of final action taken" by the employing agency or by the EEOC on the employee or applicant's administrative complaint.[2] But the statute does not define "receipt." The EEOC regulations are no more specific.[3] Though requiring the EEOC or employing agency to "notify an employee or applicant of his right to file a civil action, and of the 30-day time limit for filing,"[4] the regulations take no position on the crucial question of whether receipt of a right-to-sue letter by an employee's attorney is notice to the employee of the administrative decision. The government suggests that the triggering event for the thirty-day time period is receipt of the EEOC right-to-sue letter by the claimant or by the office of the claimant's attorney, whichever occurs first. The district court agreed, finding it lacked jurisdiction over Irwin's Title VII claim because the complaint was filed more than thirty days after the right-to-sue letter arrived at Irwin's attorney's office. Irwin argues that the thirty-day period should not begin running until the claimant receives actual notice of his right to sue, or at least until the attorney has actual notice.

Our analysis begins with *Ringgold v. National Maintenance Corp.*[5] *Ringgold* involved a Title VII action against a private employer, with a ninety-day period for filing suit.[6] In that case, the attorney who filed Ringgold's administrative complaint subsequently left her two-attorney partnership. The EEOC right-to-sue letter arrived at the firm's office on October 6, and was signed for by a relative of the remaining partner. Because the remaining partner was out of town, neither attorney learned about the EEOC decision until October 10. The complaint was filed on January 6, ninety-two days after arrival of the right-to-sue letter. We held that the suit was not timely filed, concluding that "the 90-day period of limitation established by 42 U.S.C. § 2000e-5(f)(1) begins to run on the date that the EEOC right-to-sue letter is delivered to the offices of formally designated counsel or to the claimant."[7]

* Circuit Judge of the Third Circuit, sitting by designation.

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The Synopsis, Syllabi and Key Number Classification constitute no part of the opinion of the court.

1. *See* 29 C.F.R. § 1613.214(a)(1)(i).
2. 42 U.S.C. § 2000e-16(c).
3. *See* 29 C.F.R. § 1613.281-.282.
4. 29 C.F.R. § 1613.282.
5. 796 F.2d 769 (5th Cir.1986).
6. 42 U.S.C. § 2000e-5(f)(1).
7. *Ringgold*, 796 F.2d at 770.

Irwin argues that we should not apply the constructive notice rule of *Ringgold* to his Title VII action against the federal government. He notes the longer period in which to file suit against a private employer. Further, while the ninety-day period of § 2000e–5(f)(1) is subject to equitable tolling,[8] the thirty-day span allotted under § 2000e–16(c) operates as an absolute jurisdictional limit.[9] In Irwin's view, constructive notice would add an unnecessary burden to a federal employee's Title VII rights.

[1] Our task, of course, is to discern congressional intent. Having found the constructive notice doctrine applicable under § 2000e–5(f)(1) in *Ringgold*, we see no reason to believe Congress intended a different result in suits against the government than in suits against private employers. We have adopted a "system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.'"[10] This basic policy choice is reflected in Fed.R.Civ.P. 5(b), making service of papers on a party's attorney the normal procedure. Congress enacted § 2000e–16(c) against this background. We are persuaded that the sufficiency of notice to a person's lawyer is so ingrained that we should expect Congress to say so if it intends a different rule. Nor is the thirty-day time limit under this statute more burdensome than many other time limits within which attorneys must operate.

Irwin also relies on our decision in *Cooper v. Lewis*,[11] where we determined that notice to an attorney would not be imputed to the employee for purposes of a fifteen-day time period governing appeals from an employing agency to the Civil Service Commission Appeals Review Board. The fifteen-day limit was not statutory, but rather was created by the agency pursuant to its rulemaking authority. We interpreted the regulation to require actual notice to the claimant as the triggering event. In doing so, we were persuaded that the regulation comfortably abided our charge to liberally construe the provisions of Title VII.

In *Cooper*, we relied on three cases from other circuits interpreting § 2000e–16(c), the statute now before us. In *Bell v. Brown*,[12] a divided panel of the D.C. Circuit read "receipt" in § 2000e–16(c) to mean receipt by the employee, relying on the principle of liberal construction of remedial statutes. It also rested its decision on judicial deference to administrative construction of the statute, arguing that the "Civil Service Commission's interpretations of that section have consistently reflected the theme that the 30-day period for suit is not set in motion until notice of the final administrative action is obtained by the affected employee, irrespective of when it might reach a representative."[13] The dissent emphasized that parties are generally deemed to have notice of facts known to their attorneys.[14]

8. *Coke v. General Adjustment Bureau, Inc.*, 640 F.2d 584, 592-93 n. 15 (5th Cir.1981).

9. *Bell v. Veterans Administration Hosp.*, 826 F.2d 357, 360–61 (5th Cir.1987).

10. *Link v. Wabash R.R. Co.*, 370 U.S. 626, 634, 82 S.Ct. 1386, 1390, 8 L.Ed.2d 734 (1962) (quoting *Smith v. Ayer*, 101 U.S. (11 Otto.) 320, 326, 25 L.Ed. 955 (1879)).

11. 644 F.2d 1077 (5th Cir. Unit A May 1981).

12. 557 F.2d 849 (D.C.Cir.1977).

13. *Id.* at 854.

14. *Id.* at 857–58 (Robb, J., dissenting).

In *Craig v. Department of Health, Education & Welfare*,[15] the Eighth Circuit followed *Bell*, giving the same two reasons for its decision. However, it carved out an exception where a certified letter is sent to a representative designated by the employee, addressed in accordance with the employee's specific directions, and the representative personally acknowledges receipt of the notice. In *Rea v. Middendorf*,[16] the Sixth Circuit relied on *Bell* to affirm dismissal of a Title VII complaint, reasoning that the thirty-day period began running when the employee received notice of the adverse administrative decision, and not from the later date when his attorney received notice.

In *Cooper*, we expressed approval for the holdings of *Bell*, *Craig* and *Rea* in dicta:

> [S]ince the Commission did not intend the fifteen-day time period established by Commission regulations to commence upon receipt of notice by the complainant's representative, and since that interpretation comports with the policy that the Act should be liberally construed in favor of those that it is designed to protect, we are compelled to hold that the constructive notice doctrine is inapplicable here. While the Sixth, Eighth, and D.C. Circuit cases dealt with the statutory thirty-day time period, *we find their reasoning applicable here and agree with their result.* Indeed, we find that result even more compelling here where the court is dealing with a Commission regulation that establishes an extremely short period within which an employee may appeal to the Review Board and that anticipates that notice to the employee—not his representative—will trigger the running of the limitation period. Therefore, we hold that in the present case, the fifteen-day time period established by Commission regulations for federal employees to appeal to the Civil Service Commission Appeals Review Board began to run when the employee received the notice.[17]

Irwin invites us to take the next step of turning *Cooper*'s dicta into holding. We decline the invitation. Forced to choose between *Ringgold* and *Cooper*, we find *Ringgold* more analogous to our present inquiry. *Cooper*, after all, involved construction of a regulation adopted by the relevant administrative agency. Thus, *Cooper*'s primary focus was upon the intent of the Civil Service Commission. Our task, as in *Ringgold*, is to determine Congressional intent without the assistance of a regulator's interpretive effort.

Further, when *Bell*, *Craig* and *Rea* were decided, regulatory authority under this statute rested with the Civil Service Commission. Those cases relied on CSC regulations, which specifically stated that the employee could file a civil action "[w]ithin thirty (30) calendar days of his receipt of notice of final action" taken by his agency or by the Commission on his complaint.[18] Since then, regulatory authority has been shifted to the Equal Employment Opportunity Commission.[19] While the EEOC adopted many of the CSC's regulations verbatim, this particular regulation was soon

15. 581 F.2d 189 (8th Cir.1978).

16. 587 F.2d 4 (6th Cir.1978).

17. *Cooper*, 644 F.2d at 1085 (emphasis supplied).

18. *See* 37 Fed.Reg. 25,699 (1972) (text of 5 C.F.R. § 713.281(a), (c) (emphasis supplied)); *Rea*, 587 F.2d at 5 (quoting 5 C.F.R. § 713.281(a)).

19. *See* 43 Fed.Reg. 60,901 (1978).

modified by dropping the word "his" from in front of "receipt."[20] Thus, the current regulation does not specify whose receipt of notice triggers the thirty-day time clock for filing a civil action.[21] Without an authoritative administrative interpretation of the statute, much of the rationale for *Bell, Craig* and *Rea* disappears. *Cooper* also becomes less persuasive, since it involved interpretation of a CSC regulation, rather than its EEOC counterpart, and since it rested on *Bell, Craig* and *Rea* in reaching its result. Thus, we apply the constructive notice doctrine of *Ringgold*, and find that the district court lacked jurisdiction over Irwin's Title VII claim.

II

[2] Irwin next asserts that the district court erred when it dismissed his claims under 42 U.S.C. §§ 1985 and 1986. The district court based its decision on *Brown v. General Services Administration*,[22] which held that Title VII provides the exclusive remedy for claims of employment discrimination filed against the federal government. Irwin admits the principle, but insists that he pled claims under §§ 1985 and 1986 which were sufficiently distinct from employment discrimination claims to avoid the bar of *Brown*. We need not decide the scope of *Brown*. To rely on § 1985, a plaintiff must plead the operative facts upon which his claim is based, more than conclusory allegations.[23] If Irwin intended to plead claims sufficiently distinct from the employment context to escape *Brown*, he has not done so with the required degree of specificity. Since a § 1985 conspiracy forms an integral part of a claim under § 1986,[24] Irwin's reliance on the latter statute is also undermined.

III

[3] Irwin argues finally that the district court erred in dismissing his age discrimination complaint. We have previously outlined the two "avenues of relief" available to a plaintiff alleging age discrimination in federal employment:

> He may file an administrative complaint with the employing federal agency, and if the employing agency's determination is adverse to him he may appeal to the Civil Service Commission [now the Equal Employment Opportunity Commission] for administrative review. After the administrative complaint has been filed with the Commission, a civil action then may be instituted. Alternatively, the employee has the option under the Act to bypass the administrative process either in part or in its entirety and proceed directly to federal court thirty days after notice of intent to sue has been given to the Commission as long as such notice is given "within one hundred and eighty days after the alleged unlawful practice occurred."[25]

The plaintiff must either "seek relief through one of the two avenues described or alternatively claim equitable grounds for not having so proceeded and must prove that the reasons he was prevented from

20. *See* 45 Fed.Reg. 24,133 (1980) (text of 29 C.F.R. § 1613.281(a). (c)).

21. 29 C.F.R. § 1613.281.

22. 425 U.S. 820, 835, 96 S.Ct. 1961, 1969, 48 L.Ed.2d 402 (1976).

23. *Holdiness v. Stroud*, 808 F.2d 417, 424 (5th Cir.1987).

24. *See Hamilton v. Chaffin*, 506 F.2d 904, 913–14 (5th Cir.1975).

25. *Paterson v. Weinberger*, 644 F.2d 521, 523–24 (5th Cir.1981) (citations omitted).

proceeding can be blamed upon the employing agency."[26]

When a defendant makes a "factual attack" on the court's jurisdiction, the plaintiff must "prove the existence of subject-matter jurisdiction by a preponderance of the evidence."[27] An attack is "factual" rather than "facial" if the defendant "submits affidavits, testimony, or other evidentiary materials."[28] The plaintiff is obliged "to submit facts through some evidentiary method" to sustain his burden of proof.[29]

In this case, the government challenged the district court's subject matter jurisdiction over the age discrimination claim in its Amended Motion to Dismiss. The primary thrust of its argument was that exhaustion of remedies is a jurisdictional prerequisite, and that it should have been alleged in his complaint in district court. Appellees also argued, however, that "the evidence ... submitted to the Court suggests that plaintiff never raised this issue with the EEOC." The government attached Irwin's EEO Counseling Report, which did not mention claims based on age discrimination. The district court ordered the parties to submit evidence on the question of jurisdiction over the Title VII claim, but made no similar request with respect to the other jurisdictional attacks. In reply to the motion to dismiss the age discrimination claim, Irwin argued:

> Defendants next assert that Plaintiff failed to include age discrimination as an element in his administrative proceedings. Plaintiff, in seeking redress through the administrative routes, asserted all claims including those of age discrimination. That the Equal Employment Opportunity Commission in its decision did not directly address Plaintiff's age discrimination claim, is not binding, or should not be found to be binding upon the Plaintiff at this time. Plaintiff asserted through the EEO counsel all matters alleged in Plaintiff's complaint herein, including his age discrimination assertion.

Irwin offered no evidence to back up this claim. The district court treated the attack on its jurisdiction as factual, finding that appellant had neither filed a formal age discrimination complaint with his agency nor given notice of his intent to sue. The court also stated that Irwin offered no reason justifying his failure to give such notice. We affirm.

AFFIRMED.

26. *Id.* at 524.

27. *Middle South Energy, Inc. v. City of New Orleans*, 800 F.2d 488, 490 (5th Cir.1986).

28. *Paterson*, 644 F.2d at 523.

29. *Id.*

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United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 88-1736

D.C. Docket No. W-87-CA-104

U.S. COURT OF APPEALS
FILED
JUN 13 1989
GILBERT F. GANUCHEAU
CLERK

SHIRLEY W. IRWIN,

Plaintiff-Appellant,

versus

VETERAN'S ADMINISTRATION,
ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Western District of Texas

Before ALDISERT,* REAVLEY, and HIGGINBOTHAM, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that each party bear its own costs on appeal.

June 13, 1989

ISSUED AS MANDATE:

*Circuit Judge of the Third Circuit, sitting by designation.

OP-JDT-9C
Rev. 4/85

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 88-1736

U.S. COURT OF APPEALS
FILED
JUL 13 1989
GILBERT F. GANUCHEAU
CLERK
D-7/13
djf

SHIRLEY W. IRWIN,

Plaintiff-Appellant,

versus

VETERAN'S ADMINISTRATION,
ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Western District of Texas

ON PETITION FOR REHEARING

(July 13, 1989)

Before ALDISERT*, REAVLEY and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby Denied.

ENTERED FOR THE COURT:

Patrick E. Higginbotham
United States Circuit Judge

RECEIVED JUL 31 1989
REHG-4

*Circuit Judge of the Third Circuit, sitting by designation.

CERTIFICATE OF SERVICE

I hereby certify that on October 10, 1989, true and correct copies of the foregoing Petition for Certiorari, along with the Appendix thereto, have been mailed to the Solicitor General, Department of Justice, Washington, D.C. 20530 by certified mail, return receipt number P#577 904 111 and a true and correct copy has been forwarded to opposing counsel by certified mail, return receipt #P141 598 903.

JON R. KER

NOTARIZED STATEMENT

JON R. KER, of lawful age, being first duly sworn, upon his oath states as follows:

1. That I am a member of the Bar of the U. S. Supreme Court.

2. That in conformity with the Certificate of Service attached to the Petition for Writ of Certiorari, the Petition for Writ of Certiorari was mailed by U. S. Mail, first class, postage prepaid, properly addressed, to the Clerk of the Supreme Court, within the time allowed for filing. Specifically, that the same was deposited within the U. S. mails on October 10, 1989.

3. To my knowledge, the mailing of the Petition for Writ of Certiorari took place on October 10, 1989 and that such date of mailing is within the permitted time for filing of the same.

Further affiant saith not.

JON R. KER

SUBSCRIBED AND SWORN TO before me by the said JON R. KER on this 10th day of October, 1989.

JANICE STEWART
Notary Public
STATE OF TEXAS
My Comm. Exp. 07/13/93

Notary Public, State of Texas

ORIGINAL

Supreme Court, U.S.
FILED
DEC 27 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-5867

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

SHIRLEY W. IRWIN, PETITIONER

v.

VETERANS ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

KENNETH W. STARR
Solicitor General

STUART M. GERSON
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QUESTIONS PRESENTED

1. Whether the time limit of 42 U.S.C. 2000e-16(c), which requires a government employee to file a Title VII employment discrimination suit in federal court within thirty days of receipt of notice of final administrative action on his complaint, is jurisdictional.

2. Whether receipt by petitioner's attorney's office of notice of final administrative action triggers the thirty-day period for filing a Title VII complaint against the federal government within the meaning of 42 U.S.C. 2000e-16(c).

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

No. 89-5867

SHIRLEY W. IRWIN, PETITIONER

v.

VETERANS ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 11-16) is reported at 874 F.2d 1092. The opinion of the district court is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 13, 1989. A petition for rehearing was denied on July 13, 1989. The petition for a writ of certiorari was filed on October 10, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was dismissed by the Veterans Administration Medical Center in Waco, Texas, on April 17, 1986. On June 12, 1986, he contacted an Equal Employment Opportunity Counselor, alleging that the dismissal was based on discrimination on the basis of his age and handicap, as well as in retaliation for his previous efforts to obtain redress for past acts of discrimination by the agency. Pet. App. 11-12; Pet. 2.

Petitioner eventually filed a formal complaint with the Veterans Administration, but that complaint was rejected on the ground that he had failed to contact the EEO Counselor within thirty days of the alleged discrimination, as required by agency regulations (29 C.F.R. 1613.214(a)(1)(i)). Petitioner appealed

to the Equal Employment Opportunity Commission, which affirmed the VA's decision on March 19, 1987. Pet App. 11-12; Pet. 3.

Notice of the EEOC decision was delivered to the office of petitioner's attorney, and an employee of the attorney signed a receipt for the letter on March 23, 1987. At the time, the attorney was in Korea with his United States Army Reserve unit; he asserts that he first learned of the decision on April 10, 1987. Pet. App. 12.[1/] Petitioner filed suit in district court on May 6, 1987, which the district court dismissed.

2. The court of appeals affirmed. In Ringgold v. National Maintenance Corp., 796 F.2d 769, 770 (5th Cir. 1986), the court of appeals previously had held that, for purposes of Title VII actions against private employers, "the 90-period of limitation established by 42 U.S.C. § 2000e-5(f)(1) begins to run on the date that the EEOC right-to-sue letter is delivered to the offices of formally designated counsel or to the claimant," even if counsel himself did not actually receive notice until later. In the instant case, the court of appeals followed Ringgold and held that petitioner received constructive notice of the EEOC final decision on March 23, 1987, when the decision was received at his lawyer's office. Accordingly, because the complaint was not filed within thirty days of that date, as required by 42 U.S.C. 2000e-16(c), the court determined that the district court lacked jurisdiction over petitioner's Title VII claim. Pet. App. 12-15.[2/]

ARGUMENT

1. The United States, as sovereign, is immune from suit save as it consents to be sued. Title VII remedies against the government, which constitute such consent, thus necessarily

---

1/ Petitioner asserted by affidavit that his "best information" is that he himself received actual notice of the EEOC decision on April 7, 1987 (Pet. 3).

2/ The court of appeals observed (Pet. App. 13) that "while the ninety-day period of § 2000e-5(f)(1) is subject to equitable tolling, the thirty-day span allotted under § 2000e-16(c) operates as an absolute jurisdictional limit," citing Bell v. Veterans Administration Hosp., 826 F.2d 357, 360-361 (5th Cir. 1981).

implicate issues of governmental immunity, see Brown v. GSA, 425 U.S. 820, 833 (1976). Accordingly, the terms of the statutory consent to be sued in any court define that court's jurisdiction to entertain the suit, Lehman v. Nakshian, 453 U.S. 156, 160 (1981), and such waivers of sovereign immunity are to be strictly construed. Id. at 161.

For these reasons, the court below correctly concluded that the timely filing requirement in Section 2000e-16(c) is a jurisdictional prerequisite to district court consideration of a Government employee's Title VII complaint. Accord, Sims v. Heckler, 725 F.2d 1143, 1145-1146 (7th Cir. 1984); Rice v. Hamilton Air Force Base Commissary, 720 F.2d 1082, 1083 (9th Cir. 1983). See also Hallstrom v. Tillamook County, 110 S. Ct. 304 (1989)(where a party suing under the citizen suit provisions of the Resource Conservation and Recovery Act of 1976 fails to meet the notice and 60-day delay requirements of 42 U.S.C. 6972(b), the district court must dismiss the action as barred by the terms of the statute). But see Martinez v. Orr, 738 F.2d 1107, 1110 (10th Cir. 1984)(thirty-day limitation period in 42 U.S.C. 2000e-16(c) is not jurisdictional); Milam v. United States Postal Service, 674 F.2d 860, 862 (11th Cir. 1982)(same); Washington v. Ball, No. 89-8508 (11th Cir. Dec. 13, 1989)(same); Saltz v. Lehman, 672 F.2d 207, 208 (D.C. Cir. 1982)(same).

2. There is, however, no need for this Court to address the apparent conflict in the Circuits on that issue in this case. Cf. Stuckett v. United States Postal Service, 469 U.S. 898 (1984) (White, J., dissenting from denial of certiorari petition, citing conflict in Circuits), because the court below was clearly correct when it decided that petitioner had received constructive notice of the EEOC decision when it was accepted at the office of his designated counsel, and because petitioner has failed to show why his complaint, in any event, could not have been filed within the 30-day limitation period.

As this Court has held, we operate under a "system of representative litigation, in which each party is deemed bound by

the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.'" Link v. Wabash R.R. Co., 370 U.S. 626, 634 (1962), quoting Smith v. Ayer, 101 U.S. (11 Otto.) 320, 326 (1879). This basic policy choice is reflected in Fed. R. Civ. P. 5(b), making service of papers on a party's attorney the normal procedure.

Congress enacted Section 2000e-16(c) against this background. Until there is a clear expression by Congress to the contrary, this longstanding tradition should prevail. See Decker v. Anheuser-Busch, 632 F.2d 1221, 1224 (5th Cir. 1980), vacated and remanded for additional fact finding, 670 F.2d 506 (1982) (en banc).

The circuits that have addressed the issue have almost uniformly concluded that an EEOC right to sue notice delivered to a claimant's attorney constitutes notice to the claimant for purposes of computing the statutory time limit. See, e.g., Josiah-Faeduwor v. Communications Satellite Corp., 785 F.2d 344, 347 (D.C. Cir. 1986); Jones v. Madison Services Corp., 744 F.2d 1309, 1313-1314 (7th Cir. 1984); Harper v. Burgess, 701 F.2d 29, 30 (4th Cir. 1983); Gonzalez v. Stanford Applied Engineering, 597 F.2d 1298, 1299 (9th Cir. 1979). Cf. Craig v. Department of HEW, 581 F.2d 189, 193 (8th Cir. 1978) (interpreting Civil Service Commission regulations as requiring personal acknowledgment by attorney of receipt of notice).[3/] The "bright-line" procedural rule adopted by the court below -- that such notice is effective from the time of its delivery to the attorney's office, regardless of when the attorney actually reads the communication (see Ringgold v. National Maintenance Corp., 796 F.2d at 770; Decker v. Anheuser-Busch, 632 F.2d at 1224), is reasonable and

[3/] As the court of appeals noted (Pet. App. 14-15), when Craig was decided regulatory authority under Title VII rested with the Civil Service Commission, whose regulations stated that the employee could file a civil action "[w]ithin thirty (30) calendar days of his receipt of notice of final [administrative] action". 5 C.F.R. 713.281(a), (c) (1972) (emphasis added). Since then, regulatory authority has been shifted to the EEOC, and the regulation has been modified by dropping the word "his" in front of "receipt." 29 C.F.R. 1613.281(a), (c) (1980).

fully consistent both with Fed. R. Civ. P. 5(b)[4/], and with the purposes of Title VII.

Finally, this is not a case where the petitioner or the petitioner's attorney was unaware of the delivery of the notice of the EEOC decision until after the expiration of the thirty-day filing period. As early as April 10, 1987, petitioner's attorney knew that notice of the EEOC decision had been received in his office on March 23, 1987; although petitioner was apparently not sure when he actually received notice, he believed it was on April 7, 1987. Pet. 3.[5/] Clearly, then, petitioner was on notice that the thirty-day filing period might have started running well before April 7, 1987. He nevertheless opted not to file suit in the district court until May 6, 1987. In this situation, he is hardly in a position to complain of the effects of the failure to file a timely complaint.

[4/] Fed. R. Civ. P. 5(b) provides in relevant part that:

> Service upon the attorney or upon a party shall be made by delivering a copy to the attorney or party or by mailing it to the attorney or party at the attorney's or party's last known address * * *. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at the attorney's or party's office with a clerk or other person in charge thereof; * * *.

[5/] This uncertainty demonstrates the difficulty with the "actual notice" rule that petitioner advocates.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1989

No. 89-5867

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In The

Supreme Court of the United States

October Term, 1989

SHIRLEY W. IRWIN,

Petitioner,

v.

VETERAN'S ADMINISTRATION, ET AL,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

JOINT APPENDIX

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Petition For Certiorari Filed October 10, 1989
Certiorari Granted February 20, 1990

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RELEVANT DOCKET ENTRIES

U.S. DISTRICT COURT

5/6/87	1	Complaint filed
7/22/87	6	Response by Shirley W. Irwin to motion to dismiss
7/28/87	7	Amended complaint by Shirley W. Irwin against USA (Veteran's Administration), Irvin D. Noll, Robert L. Cimber, Charles Stenslie, and James Strong amending complaint
7/28/87	8	Demand for jury trial by Shirley W. Irwin
8/14/87	11	Order that each party offer any proof it has within ten (10) days on the issue of the date of receipt of Plaintiff's "right to sue letter" from the EEOC
8/26/87	12	Response by Shirley W. Irwin to order
5/12/88	29	Motion by Shirley M. Irwin for reconsideration of the Court's Order dismissing Plaintiff's claims under Title VII of the Civil Rights Act of 1964 and Age Discrimination In Employment Act of 1978
5/13/88	30	Brief by Shirley W. Irwin in support of motion for reconsideration of the Court's Order dismissing Plaintiff's claims under Title VII of the Civil Rights Act of 1964 and Age Discrimination In Employment Act of 1978
8/15/88	37	Response by Shirley W. Irwin to Defendants' motion for reconsideration
8/15/88	38	Amended motion for reconsideration of the Court's Order dismissing Plaintiff's claims under Title VII of the Civil Rights Act of 1964 and Age Discrimination In

		Employment Act of 1978 [29-1] for reconsideration "amended" by Shirley W. Irwin
9/14/88	40	Order denying amended motion for reconsideration [38-1], granting motion for reconsideration [33-1], of the Court's Order dismissing Plaintiff's claims under Title VII of the Civil Rights Act of 1964 and Age Discrimination In Employment Act of 1978 [29-1], and the Plaintiff's remaining claims under the First and Fifth Amendments and under 29:791 ET SEQ. are dismissed
9/14/88	41	Judgment for USA, Irvin D. Noll, Robert L. Cimber, Charles Stenslie, James Strong against Shirley W. Irwin; ordered, adjudged, and decreed that this cause of action is dismissed; costs of court are to be borne by the party incurring same
9/14/88	–	Case dismissed
9/26/88	42	Notice of appeal by Shirley W. Irwin
9/11/89	43	Certified copy of judgment of USCA affirming district court's ruling and dismissing appeal

U.S. COURT OF APPEALS

9-26-88	Notice of Appeal filed in District Court
4-5-89	Oral Argument
6-13-89	Decision entered
6-26-89	Appellant's Petition for Rehearing filed
7-13-89	Order Denying Appellant's Petition for Rehearing

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Office of Review and Appeals
5203 Leesburg Pike, Suite 900
Falls Church, Virginia 22041

Shirley W. Irwin, Appellant,	)	
v.	)	Appeal No. 01863333
Veterans Administration, Agency.	)	

DECISION

Appellant filed an appeal with this Commission from a final decision of the agency concerning his complaint of unlawful employment discrimination, in violation of Section 501 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §791 *et seq*. The agency decision is dated September 4, 1986. The appeal was postmarked September 4, 1986. Accordingly, the appeal is timely (*see* 29 C.F.R. §1613.233(a)), and is accepted in accordance with EEOC Order No. 960, as amended.

The agency rejected appellant's complaint on the grounds that appellant failed to seek EEO counseling in a timely fashion.

A review of the record reveals that appellant alleges that he was discriminated against on April 17, 1986.

EEOC Regulation 29 C.F.R. §1613.214(a)(1)(i) requires that complaints of discrimination be brought to the attention of the Equal Employment Opportunity Counselor within

thirty (30) days of the date of the matter causing appellant to believe he was discriminated against, or if a personnel action, within 30 calendar days of its effective date. Here, the record reflects that appellant first sought EEO counseling with respect to the rejected allegations on June 12, 1986. Appellant failed to submit adequate justification, pursuant to 29 C.F.R. §1613.214(a)(4), for extending the time limitation beyond thirty days. Accordingly, the agency's decision to reject appellant's complaint as untimely was proper and is AFFIRMED. 29 C.F.R. §1613.215.

A statement of appellant's rights (R-1) is attached to this decision.

FOR THE COMMISSION:

19 MAR 1987
DATE

/s/ Dolores L. Rozzi, Director
Dolores L. Rozzi, Director
Office of Review and Appeals

U.S. EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Washington, D.C. 20507

NOTICE OF RIGHT TO FILE A CIVIL ACTION

You are hereby notified that the attached decision in your case is final. You have the right to file a civil action in the appropriate United States District Court *WITHIN THIRTY (30) DAYS* from the date that you receive this decision. If any of your claims were based on the Age Discrimination

in Employment Act of 1967 (29 U.S.C. §633a), *AS TO THOSE CLAIMS ONLY*, you *MAY* have up to six years after the right of action first accrued in which to file a civil action. *See Lehman v. Nakshian*, 453 U.S. 156 (1981); 29 U.S.C. §633a(f); and 28 U.S.C. §2401(a). You are further notified that if you file a civil action, *YOU MUST NAME THE APPROPRIATE OFFICIAL AGENCY OR DEPARTMENT HEAD AS THE DEFENDANT.* Rule 25(d)(2) of the Federal Rules of Civil Procedure provides that you may describe the defendant by official title rather than by name. Failure to provide the *NAME OR OFFICIAL TITLE* of the agency head or, where appropriate, the department head, may result in the loss of any judicial redress to which you may be entitled. (Please note: For this purpose, Department means the overall national organization, such as the now defunct Department of Health, Education and Welfare, *not* the local administrative department where you might work.) You must be sure that the proper defendant is named when you file your civil action.

APPOINTMENT OF COUNSEL

If you decide to file a civil action and do not have or are unable to obtain the services of an attorney to act on your behalf, under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*, as amended, and the Rehabilitation Act of 1973, 29 U.S.C. §§791 and 794c, as amended, you may request that the Court appoint an attorney to represent you and may also permit you to file the civil action without payment of fees, costs, or security. If you want to request appointment of an attorney, your request must be

FILED WITH THE COURT WITHIN THIRTY (30) DAYS from the date that you receive the Commission's decision.

NOTICE OF RIGHT TO REQUEST REOPENING

The Commissioners may, in their discretion, reopen and reconsider the decision in your case if you submit a written request and argument or evidence which tends to establish that:

1. New and material evidence is available that was not readily available when the previous decision was issued; or

2. The previous decision involves an erroneous interpretation of law or regulation or misapplication of established policy; or

3. The previous decision is of a precedential nature involving a new or unreviewed policy consideration that may have effects beyond the actual case at hand or is otherwise of such an exceptional nature as to merit the personal attention of the Commissioners.

AGENCY REQUESTS AND ANY SUPPORTING ARGUMENTS, must be submitted within the 30 day time frame for filing a request to reopen. *ALL REQUESTS* must be submitted to the Director, Office of Review and Appeals, Equal Employment Opportunity Commission, 5203 Leesburg Pike, Suite 900 Falls Church, Virginia 22041.

FILING A REQUEST TO REOPEN WITH THE COMMISSION MAY NOT EXTEND THE TIME PERIOD ALLOWED FOR FILING A CIVIL ACTION. IF YOU WISH TO PRESERVE YOUR RIGHT TO FILE A CIVIL ACTION, THE CIVIL ACTION SHOULD BE FILED WITHIN THE

TIME ALLOWED, EVEN IF YOU DECIDE TO REQUEST REOPENING BY THE COMMISSION.

/s/ Dolores L. Rozzi, Director
Dolores L. Rozzi, Director
Office of Review and Appeals

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
OFFICE OF REVIEW AND APPEALS
5203 LEESBURG PIKE, SUITE 900
FALLS CHURCH, VIRGINIA 22041

OFFICIAL BUSINESS
Penalty for private use $300

P 421 670 532

POSTAGE AND FEES
Equal Employment Opportunit

HOLD

DATE
3-24-87
1ST NOTICE
MAY 1987
2ND NOTICE
4-7
RETURN

Detached from
PS Form 3849-A
Oct. 1980

Shirley W. Irwin
600 Maxfield
Waco, TX 76705

ORW 00 09211611 03/21/87
NOTIFY SENDER OF NEW ADDRESS
ORWIN
RT 6'BOX 1458
WACO TX 76706-9705

BEST AVAILABLE COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

SHIRLEY W. IRWIN, Plaintiff, v. VETERANS ADMINISTRATION, an official agency or Department of the United States of America, IRVIN D. NOLL, ROBERT L. CIMBER, CHARLES STENSLIE, and JAMES STRONG, Individuals, Defendants.	§ § § § § § § § § § § § §	CIVIL ACTION NO. W-87-CA-104

ORDER

On this date came on to be considered the motion of the Defendants to dismiss. Defendants take the position that as to the Title VII claims, Plaintiff did not bring suit within thirty (30) days of her receipt of the "right to sue letter" from the Equal Employment Opportunity Commission. Defendants base this assertion on the fact that the Equal Employment Opportunity Commission rendered its decision March 19, 1987; that a copy of this decision was received by Defendants' General Counsel on March 21, 1987; and that Plaintiff did not file suit until May 6, 1987.

Plaintiff responds by stating that the complaint was filed within thirty (30) days of receipt by Plaintiff, but neither offers proof nor even states the date of receipt.

This issue could dispose of Plaintiff's Title VII claims. Accordingly, it is

ORDERED that each party shall offer any proof it has on this issue within ten (10) days.

SIGNED this 14th day of August, 1987.

/s/ Walter S. Smith, Jr.
WALTER S. SMITH, JR.
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

(Caption omitted in printing)

(Filed August 26, 1987)

PLAINTIFF'S RESPONSE TO COURT REQUEST

COMES NOW the Plaintiff, Shirley W. Irwin, in reply to the Order of the Court for information respecting Plaintiffs' receipt of notice of the determination by the Equal Employment Opportunity Commission herein, Plaintiff would respectfully show unto the Court as follows:

1. Plaintiff attaches hereto his affidavit indicating the date of Plaintiffs' receipt of the determination by the EEOC.

2. Plaintiff attempted to file the herein affidavit on Monday, August 24, 1987 but was not accepted by the Clerk for filing.

WHEREFORE, PREMISES CONSIDERED, Plaintiff respectfully submits Plaintiffs affidavit in explanation of his receipt of the determination by the EEOC.

DATED this the 25th day of August, 1987.

RESPECTFULLY SUBMITTED:

/s/ Jon R. Ker,
JON R. KER, ATTORNEY
AT LAW
STATE BAR OF TEXAS NO.
11327700
P.O. BOX 1087
HEWITT, TEXAS 76643
817-666-1122

(Certificate of Service
omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

(Caption, omitted in printing)

AFFIDAVIT

SHIRLEY W. IRWIN, of lawful age, being first duly sworn upon oath states as follows:

1. My name is SHIRLEY W. IRWIN and I am the plaintiff in the above entitled and numbered cause.

2. I received the decision of the Equal Employment Opportunity Commission by certified mail on or about the 7th day of April, 1987.

3. This affidavit is given in response to the order of the Court dated August 14, 1987, as proof of when I actually received the decision of the Equal Employment Opportunity Commission.

FURTHER AFFIANT SAITH NAUGHT.

Dated this 20 day of August, 1987.

/s/ Shirley W. Irwin
Shirley W. Irwin
Affiant

STATE OF TEXAS)
)
COUNTY OF MCLENNAN)

SUBSCRIBED AND SWORN TO BEFORE ME by the said Shirley W. Irwin on this 21st day of August, 1987.

/s/ Terri Anderson
NOTARY PUBLIC
IN AND FOR
THE STATE OF TEXAS

TERRI ANDERSON
Notary Public, State of Texas
My Commission Expires 10-11-87

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

(Caption omitted in printing)

ORDER

On this date came on to be considered Defendant's Amended Motion to Dismiss. Plaintiff, Shirley W. Irwin, filed his complaint on May 6, 1987 naming as Defendants, the Veteran's Administration, an agency of the United States and Irvin D. Noll, Robert L. Cimber, and Charles Stenslie in their individual capacities. In his original complaint, Plaintiff alleges Defendant Veteran's Administration discriminated against him because of his race, age and handicap constituting violations of 42 U.S.C. § 2000e, 29 U.S.C. §§ 621 *et seq.*, and 29 U.S.C. §§ 791 *et seq.*, respectively, as well as violations under the First and Fifth Amendments to the United States Constitution. Plaintiff also alleges that the four individual Defendants "acting in concert, conspired to deprive Plaintiff of equal protection of the laws, or of equal privileges and immunities under the laws," which constitute violations of 42 U.S.C. §§ 1985 and 1986.

The United States filed a Motion to Dismiss Plaintiff's original complaint on July 10, 1987. Plaintiff filed a Reply to Defendant's Motion to Dismiss on July 22, 1987 and then filed an Amended Complaint on July 28, 1987. In that amended complaint Plaintiff added Defendant James Strong and expanded his complaint to allege age discrimination under 29 U.S.C. §§ 631 and 633a and violations of the merit system principles under 5 U.S.C. §§ 2301 and 2302. The relief requested from the above

alleged violations is an injunction, reinstatement and damages totalling $200,000 plus $500,000 in exemplary damages for the evil intent of the Defendants' "to harm the Plaintiff and deprive [him] of his rights, privileges and immunities under the law. . . . "

I.

Claims under 42 U.S.C. §§ 1985 and 1986

42 U.S.C. § 2000e-16(a)-(c) which is the jurisdictional statute of Title VII of the Civil Rights Act of 1964 provides the exclusive remedy for discrimination in federal employment in a cause of action against the United States. *Brown v. General Services Administration*, 425 U.S. 820, 835 (1976); *see also, Henderson v. United States Veterans Administration*, 790 F.2d 436 (5th Cir. 1986); *Newbold v. United States Postal Service*, 614 F.2d 46 (5th Cir. 1980). In *Newbold*, the plaintiff filed a suit, similar to this one, against the United States Postal Service as well as against four individual defendants. In applying the rule of *Brown* to the causes of action against the individuals, the Court stated:

> There was no union or individual defendant in *Brown*, so it does not squarely control with respect to suits under §§ 1981, 1983, 1985 or 1986. . . . However, the *Brown* court's broad language on preemption and exclusivity suggests there is no cause of action against individuals under § 1981 *et seq. See Gissen v. Tackman*, 537 F.2d 784, 786 (3rd Cir. 1976) (en banc).

In another case similar to the one at hand, *Polisoto v. Weinberger*, 638 F. Supp. 1353 (W.D. Tex. 1986), the District Court dismissed the plaintiff's claims of conspiracy to

deprive her of her constitutional rights under 42 U.S.C. §§ 1985 and 1986. Plaintiff attempted "to get around the clear dictates of the Supreme Court in *Brown*," but to no avail. The Court dismissed the claims under Sections 1985 and 1986 stating that any claims of discrimination are only cognizable under Title VII. *Id.* at 1369.

Here, Plaintiff asserts the four individual Defendants acted in concert with the Veterans Administration to discriminate against Plaintiff "on basis [sic] of age and physical handicaps, as well as retaliate [sic]. . . . " Plaintiff's Complaint ¶¶ 19, 23 and 32. Plaintiff also claims that each of the Defendants possessed "the power to prevent or aid in preventing the commission of said wrongs but neglected or refused to do so." Plaintiff's Complaint ¶ 27. Plaintiff in *Polisoto* made a similar claim of neglect and the Court dismissed this claim as a "novel attempt" to recharacterize her Sections 1985 and 1986 claims, [and] it is clear to the court that to prove these claims, plaintiff must also prove "discrimination and her claims were dismissed." *Polisoto*, 638 F. Supp. at 1369. Similarly, because discrimination claims in federal employment are only cognizable under Title VII, Plaintiff's claims against the Veterans Administration and the four individual defendants under 42 U.S.C. §§ 1985 and 1986 must be dismissed.

II.

Claims under Title VII of the Civil Rights Act of 1964

In a Title VII cause of action against the federal government, the Plaintiff must bring suit under 42 U.S.C. § 2000e-16. This is a jurisdictional statute which governs

complaints by a federal employee of discrimination based on race, color, religion, sex or national origin while employed by the federal government. 42 U.S.C. § 2000e-16(a). Because Plaintiff is suing the Veteran's Administration, an official agency of the United States, jurisdiction under 42 U.S.C. § 2000e-16 is proper. However, jurisdiction is not automatic upon pleading 42 U.S.C. § 2000e-16. The Plaintiff must comply with the notice requirements of this statute.

Section 2000e-16(c) provides that Plaintiff must file his claim initially with the Equal Employment Opportunity Commission [hereinafter EEOC], and if the situation cannot be resolved by the EEOC, the Plaintiff may file a civil action but only after receipt of notice of final action taken by the EEOC. Once that notice is received, Plaintiff must file his suit within thirty (30) days of the receipt of notice from the EEOC. 42 U.S.C. § 2000e-16(c). Defendants allege in this case that Plaintiff Irwin *did not* file his civil action within thirty days of his receipt of notice, and consequently urge his Title VII claims be dismissed.

Defendants initially contended that Plaintiff's cause of action was untimely in Defendant's Motion to Dismiss filed on July 10, 1987. Plaintiff responded stating that he did, in fact, file his action within thirty (30) days of the date of receipt of the EEOC's decision. Because neither party provided any proof as to when exactly notice was received, the Court requested such proof on August 14, 1987. In response to the Court Order, Plaintiff filed an affidavit merely stating that the Plaintiff personally received the decision of the EEOC by certified mail "on or about the 7th day of April, 1987" with absolutely no

supporting evidence. Defendants, on the other hand, provide a copy in the Defendants' Amended Motion to Dismiss of the return receipt. This receipt show [sic] that Margaret Riviera signed for Plaintiff's attorney, Jon R. Ker, on March 23, 1987. *See* Exhibit C to Defendant's Amended Motion to Dismiss. Mr. Ker filed suit on behalf of Plaintiff forty-four (44) days later on May 6, 1987, and it is uncontroverted that he has represented Plaintiff throughout this litigation. Plaintiff cursorily states in Plaintiff's Reply to the Amended Motion to Dismiss that "by way of previous filings," Plaintiff has shown that the herein action was initiated within thirty (30) days of receipt of notice, but the Court is not aware of any previous filings other than the above-mentioned affidavit that offers any proof as to actual date of receipt of notice. Therefore, the question is whether receipt by Plaintiff's attorney before the alleged receipt by the Plaintiff begins the running of the 30-day period, if so, Plaintiff's claim under Title VII is barred.

The Fifth Circuit addressed the issue of whether or not notice to a person's attorney constitutes notice to the person in *Decker v. Anheuser-Busch*, 632 F.2d 1221 (1980), *vacated and remanded*, 670 F.2d 506 (5th Cir. 1982) (en banc) (to elicit additional evidence as to whether an attorney-client relationship actually existed) and concludes that "there is noting new, novel or unique" about this concept. *Id.* at 1223; *see also Cooper v. Lewis*, 644 F.2d 1077, 1082 (5th Cir. 1981); *Huckeby v. Frozen Food Express*, 555 F.2d 544-45 (5th Cir. 1977) (dictum). The Court also states that "notice is effective from the time of its delivery to the attorney's office." *Id.* at 1224. It is true that statutory right-to-sue notice in *Decker* is not the same statutory notice at hand.

The *Decker* notice was required under 42 U.S.C. § 5(f)(1) which allows civil actions under Title VII. Yet, the 30-day requirement of Section 2000e-16(c) is discussed in *Polisoto v. Weinberger*, 638 F. Supp. 1353. The Plaintiff in *Polisoto* is charged with constructive knowledge of the EEOC's decision on the date her attorney of record personally acknowledged receipt of the decision. The *Polisoto* Court embraces the decision and policy of *Decker* and dismisses the Title VII claim in its entirety because of the failure to comply with 42 U.S.C. 2000e-16(c). *Id.* at 1363.

Since Plaintiff has not controverted the proof that shows his attorney received notice forty-four (44) days before suit was filed, and there is no doubt as to whether the attorney-client relationship remains intact, the logic of *Polisoto* and *Decker* is persuasive. The *Decker* court states, and this Court agrees, that:

> Involved here are the professional responsibilities of the attorney and a long standing tradition that notice to or knowledge by the attorney is notice to or knowledge by the client. Unless and until there is a clear expression by the Congress to the contrary, these professional responsibilities and this long standing tradition, must prevail. . . .

Decker, 632 F.2d at 1224.

Therefore, Plaintiff's failure to comply with 42 U.S.C. Section 2000e-16(c) 30-day filing period deprives this Court of subject matter jurisdiction, and Plaintiff's Title VII claim must be dismissed.

III.

Claims under Age Discrimination in Employment Act of 1978 (ADEA)

An employee who believes that he has been discriminated against because of his age has two avenues of relief. First, he may file a complaint with the EEOC and pursue an administrative remedy. If denied relief by the EEOC, he may then file a civil action. *See* 29 U.S.C. §§ 633a(c), (d). Second, in lieu of pursuing administrative relief, the employee may proceed directly to federal court providing he initiates the civil action no later than 180 days from unlawful action and notice of intent to sue is given to the EEOC within thirty days prior to commencing suit. *See 29 U.S.C. 633a(d); Ray v. Nimmo,* 704 F.2d 1480, 1483 (11th Cir. 1983); *Castro v. United States,* 775 F.2d 399 (1st Cir. 1985).

In this case, Plaintiff commenced an action under the ADEA without filing a formal complaint of age discrimination or notice of intent to sue with the EEOC. There is no indication on the EEOC Counseling Report provided by the Defendant in their Amended Motion to Dismiss of any complaint of age discrimination. Plaintiff urges that just because "the EEOC in its decision did not directly address Plaintiff's age discrimination claim, [sic] is not binding, or should not be found to be binding upon the Plaintiff at this time." Plaintiff's Reply to Defendant's Amended Motion to Dismiss, at 2. Yet the Plaintiff provides no authority to back up his assertion that absence of notice is not binding, and he provides no reason why he is justified in not giving notice. *See e.g. Paterson v. Weinberger,* 644 F.2d 521, 524 (5th Cir. 1981) (case remanded to allow Plaintiff to prove the reasons he was

prevented from proceeding can be blamed on employing agency). Because Plaintiff did not comply with the requirements of Section 633a(d) for initiating a civil action under the ADEA, his claims under the ADEA are dismissed.

IV.

Claims under 5 U.S.C. §§ 2301 and 2301 [sic]

5 U.S.C. Sections 2301 and 2302 set out the merit system principles of the federal government. Both parties agree that Plaintiff has no private right of action under these statutes. Therefore, the claims alleged under 5 U.S.C. Sections 2301 and 2302 are dismissed.

The remaining claims alleged by the Plaintiff that are not subject to dismissal are those under 29 U.S.C. §§ 791 *et seq.* and the First and Fifth Amendments.

IT IS, THEREFORE, ORDERED that Defendant's Motion to Dismiss Plaintiff's claims under 42 U.S.C. §§ 1985, 1986 and 2000e, 29 U.S.C. §§ 631 and 633a, 5 U.S.C. §§ 2301 and 2302 is GRANTED and said claims be and hereby are DISMISSED.

SIGNED this 21st day of April, 1988.

/s/ Walter S. Smith, Jr.
WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

(Caption omitted in printing)

(Filed May 12, 1988)

PLAINTIFF'S MOTION FOR RECONSIDERATION OF THE COURT'S ORDER DISMISSING PLAINTIFF'S CLAIMS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 AND AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1978

COMES NOW the Plaintiff, SHIRLEY W. IRWIN, and respectfully requests this Court reconsider its order dismissing Plaintiff's claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C., Section 2000e-16, claims under the Age Discrimination in Employment Act of 1978, 29 U.S.C., Section 791 and for good cause would show unto the Court the following:

I.

On April 21, 1988, this Court entered its order which, in part, dismissed Plaintiff's claims against the Defendant, Veteran's Administration, on the basis of lack of subject matter jurisdiction. Citing that Plaintiff's complaint was not filed within thirty (30) days after date of receipt of the EEOC's decision, and finding that the date of receipt of the decision was March 23, 1987, when a return receipt was signed by Margaret Rivera for Plaintiff's attorney, JON R. KER.

II.

Plaintiff hereby submits the affidavit of JON R. KER indicating that he was outside of the United States of

America with his United States Army Reserve Unit for training in the Republic of Korea from the period March 22, 1987 through August 8, 1987. As stated in the affidavit of SHIRLEY W. IRWIN, filed commensurate with Plaintiff's Response to Court Request on August 27, 1987, notice was received by Plaintiff, SHIRLEY W. IRWIN, on or about April 7, 1987. The Plaintiff, SHIRLEY W. IRWIN, believes that actual date to be April 7, 1987; however, the green return receipt card would have been returned to the Defendant or to control to Defendant, and Plaintiff cannot state a date more accurately than as stated in his affidavit.

Because Plaintiff's attorney was out of the country at the time the return receipt signed for him by Margaret Rivera on March 23, 1987, notice was not perfected to Plaintiff until actually received by Plaintiff on April 7, 1987. Therefore, the filing of Plaintiff's complaint is within the 30-day time period and jurisdiction was satisfied.

III.

Since Plaintiff's complaint was filed within 30 days of the date of actual receipt by Plaintiff and within 30 days of actual receipt by Plaintiff's attorney, albeit Margaret Rivera signed at an earlier date on behalf of said attorney, Plaintiff's complaint is timely filed and the jurisdiction of this court is satisfied, and this Court should reconsider its decision of its order dated April 21, 1988, as the same respects paragraph II, Claims Under Title VII of the Civil Rights Act of 1964 and Age Discrimination in Employment Act of 1978, and reinstate Plaintiff's claims thereunder.

IV.

Plaintiff submits his brief in support of this motion and affidavits and exhibits for the Court's consideration.

WHEREFORE, premises considered, SHIRLEY W. IRWIN respectfully prays this Court reconsider its order of April 21, 1988, respecting the dismissal of Plaintiff's claims under Title VII of the Civil Rights Act of 1964 and Age Discrimination in Employment Act of 1978, reinstate Plaintiff's claims under Title VII of the Civil Rights Act of 1964 and Age Discrimination in Employment Act of 1978, or, in the alternative, conduct and [sic] evidentiary hearing for the purposes of establishing the jurisdiction of this Court with respect to these claims.

RESPECTFULLY SUBMITTED:

/s/ Jon R. Ker
JON R. KER,
ATTORNEY AT LAW

DEPARTMENT OF THE ARMY
HEADQUARTERS, 86TH U.S. ARMY
RESERVE COMMAND
7402 W. ROOSEVELT RD.

AFKE-AC-IL-AG FOREST PARK, IL 60130-2587

ORDERS 117-052 16 MAR 87

KER, JON R. 460-72-6791 CPT
ROUTE 1, BOX 270 CO A 2/12 (214) [WTPQA4]
LORENA, TX 76655 FT WORTH, TX 76107

YOU ARE ORDERED TO ANNUAL TRAINING [AT] FOR THE PERIOD INDICATED. UPON COMPLETION OF THE PERIOD OF AT, UNLESS SOONER RELIEVED OR EXTENDED BY PROPER AUTHORITY, YOU WILL RETURN TO THE PLACE WHERE YOU ENTERED AT AND BE RELIEVED FROM SUCH DUTY.

PERIOD: 26 DAYS PLUS ALLOWABLE TRAVEL TIME.
REPORT TO: OKLAHOMA CITY, OK
REPORTING TIME/DATE: NLT 0600 HOURS, 87/03/23
ATTACHED TO: 213 CO A 2/12TH SFGA
PURPOSE: ATTEND ALT AT TNG 87 TEAM SPIRIT

ADD'L INSTRUCTIONS: DA FORM 3298 RECERTIFIED 870112
SEE REVERSE – INCORPORATED BY REFERENCE

NOTES 1, 2, 3, 7, AND 14 APPLY. APPROVAL DATE FOR EXTEEDED [sic] AT 13 MAR87
TIME 0930 HRS. W/FURTHER TVL TO FT LEWIS, WA & REPUBLIC OF KOREA

FOR ARMY USE
AUTH: 10 USC 270[A][1]
HOR: SAME AS SNL

ACCT CLASS	FY 87 AT							OBLIGATION
PAY	2172070	76-2005	P3411.4	1198	S47018	ZFGG	$	2,280
O PAY	2172070	76-2005	P3411.4	1199	S47018	ZFGG	$	403
FICA	2172070	76-2005	P3411.4	1250	S47018	ZFGG	$	163
P/D	2172070	76-2005	P3411.4	211C	S47018	ZFGG	$	46
TVL	2172070	76-2005	P3411.4	219C	S47018	ZFGG	$	393
HHG	2172070	76-2005	P3411.4	2233	S47018	ZFGG	$	0
						RPA TOTAL:	$	3,285

PERFORMANCE FACTORS:			PART	MDS	UUC	UAFIC
			1	26	FB3	Z
PPN	: NA	AT	TRNG DAYS: O PEBD			: 67/02/06
COMP	: USAR	SPEC	TRNG DAYS: O SEC CL			: S
FORMAT	: 260	SCHL	TRNG DAYS: O PX/COMM AGENT			: TERRI/WIFE

FOR THE COMMANDER:

OFFICIAL
86TH USARCOM

RICHARD L. SWANSON
CW2, USA
ASSISTANT AG

DISTRIBUTION:
1-CDR, FT MCCOY,
ATTN:AFZR-CMF
5-INDIVIDUAL
7-UNIT OF ASSIGNMENT
1-DCSRM, HQ, 86TH USARCOM
1-DCSRM, HQ, 86TH USARCOM

1-APC FUND MGR Z – ANN TNG
PROGRAM CODE: 01AEZE

AFFIDAVIT OF JON R. KER

THE STATE OF TEXAS
COUNTY OF MCLENNAN

BEFORE ME, the undersigned authority, a Notary Public, on this day personal appeared JON R. KER, known to me to be the person whose signature is hereto affixed, and after being duly sworn, on oath deposed and said:

"My name is Jon R. Ker, I am the attorney of record in the foregoing entitled and numbered cause.

2. Affiant, at times relevant hereto, was the commanding officer of detachment A-214, Company A, 2d Battalion, Twelfth Special Forces Group Airborne, and was a participant in the joint services exercise Team Spirit '87 in the Republic of Korea. For purposes of attendance at the said exercise, Affiant departed Waco, Texas on March 22, 1987, and returned April 8, 1987. Affiant suffered a broken ankle during the conduct of such exercise,

which required him to report to Darnall Army Hospital, Ft. Hood, Texas, on April 9, 1987.

3. Affiant was not present in his office until April 10, 1987, and was not actually aware and could not have been made actually aware of the receipt by Margaret Rivera of the notice from the EEOC until April 10, 1987.

4. To the best information and belief of Affiant receipt by Plaintiff, Shirley W. Irwin of the Notice of Right to Sue from the EEOC was on or about April 7, 1987, and Affiant was made aware of this fact after his return to his office on or about April 10, 1987."

Further Affiant saith not.

/s/ Jon R. Ker
JON R. KER

SUBSCRIBED AND SWORN TO before me by the said JON R. KER on this 12th day of May, 1988.

/s/ Janice Stewart
NOTARY PUBLIC,
STATE OF TEXAS

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

(Caption omitted in printing)

ORDER

Came on this date to be considered the matter of pending motions filed in the above-styled and numbered cause. Having carefully reviewed these motions, the Court makes the following disposition.

As to Plaintiff's motion and amended motion for reconsideration of the court's Order dismissing the Plaintiff's claims under Title VII of the Civil Rights Act of 1964 and Age Discrimination in Employment Act of 1978, the Court finds that such motion lacks merit and should be denied.

The thirty-day filing provision provided by 42 U.S.C. § 2000e-16 is jurisdictional in nature and subject to strict compliance. *Eastland v. Tennessee Valley Authority,* 553 F.2d 364 (5th Cir. 1977), *cert. denied* 464 U.S. 1066 (1984). Plaintiff has presented no evidence which would constitute an excuse from compliance with the thirty-day provision. *Ringgold v. National Maintenance Corp.,* 796 F.2d 769 (5th Cir. 1986).

As to Defendant's motion for reconsideration of this Court's order, the Court finds that such motion is meritorious and should be granted.

The existence of a congressionally provided "meaningful alternative remedy" is a special factor "counselling hesitation" in allowing the recovery of damages by a

federal employee for an alleged violation of his constitutional rights. *Heaney v. United States*, 756 F.2d 1215 (5th Cir. 1985). The Plaintiff's remedy must rest upon those schemes provided by statute.

29 U.S.C. § 794 provides a party with a private cause of action for discrimination due to a handicap. Section 794a sets out the applicable remedies, procedures and rights. In implementing this section, Congress promulgated 29 C.F.R. § 1613.708, which provides that regulations regarding the processing of complaints of discrimination based on a physical or mental handicap should comply with those provisions in 29 C.F.R. §§ 1613.213-1613.643 and 1613.601-1613.643. 29 C.F.R. § 1613.281 outlines the procedure an employee must follow before initiating a civil action in a United States district court including filing suit within thirty days after a final ruling by the Equal Employment Opportunity Commission.

29 U.S.C. § 794a further provides that the procedures in 42 U.S.C. 2000e-16 shall be available in an action based on discrimination due to physical or mental handicap. The thirty-day requirement regarding the Title VII claims applies equally to a claim based on discrimination due to a physical or mental handicap. As previously noted, Plaintiff has raised no issue which would justify excusing compliance with this thirty-day provision.

IT IS, THEREFORE, ORDERED that the Plaintiff's motion for reconsideration be and is hereby **DENIED.**

IT IS FURTHER ORDERED that the Defendant's motion for reconsideration be **GRANTED,** and that the Plaintiff's remaining claims under the First and Fifth

Amendments and under 29 U.S.C. §§ 791 *et seq.* be dismissed.

SIGNED this 13th day of September, 1988.

/s/ Walter S. Smith, Jr.
WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

(Caption omitted in printing)

JUDGMENT

In accordance with the Order of this Court entered in the above-styled and numbered cause, the Court enters its judgment as follows:

IT IS ORDERED, ADJUDGED and **DECREED** that this cause of action be and is hereby **DISMISSED.**

Cost of court are to be borne by the party incurring same.

SIGNED this 13th day of September, 1988.

/s/ Walter S. Smith, Jr.
WALTER S. SMITH, JR.
UNITED STATES DISTRICT
JUDGE

United States Court of Appeals,
Fifth Circuit.

June 13, 1989.

Shirley W. IRWIN, Plaintiff-Appellant,

v.

VETERANS ADMINISTRATION, et al.,

Defendants-Appellees.

No. 88-1736.

Appeal from the United States District Court for the Western District of Texas.

Before ALDISERT,* REAVLEY, and HIGGINBOTHAM, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

The Veterans Administration Medical Center in Waco, Texas on April 17, 1986 fired Irwin, an employee. He contacted an Equal Employment Opportunity Counselor on June 12, 1986, and later filed a complaint with the Veterans Administration. The VA rejected Irwin's claim on the ground that he failed to contact an EEO Counselor within thirty days of the alleged discrimination.[1] Irwin appealed to the Equal Employment Opportunity Commission, which affirmed the VA's decision.

Notice of the EEOC decision was delivered to the office of Irwin's attorney, and an employee of the attorney signed a receipt for the letter on March 23, 1987. At the time, the attorney was in Korea with his United States

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* Circuit Judge of the Third Circuit, sitting by designation.

[1] *See* 29 C.F.R. § 1613.214(a)(1)(i).

Army Reserve unit. Irwin claims that he received notice of the EEOC decision on April 7, and the attorney asserts that he first actually learned of the decision on April 10. Irwin filed this suit on May 6. The district court dismissed Irwin's complaint, and this appeal ensued.

I

We are asked to identify the triggering event which starts the thirty-day time clock for filing a Title VII employment discrimination complaint against the federal government. The statute is of little assistance, providing only that a civil action may be filed "[w]ithin thirty days of receipt of notice of final action taken" by the employing agency or by the EEOC on the employee or applicant's administrative complaint.[2] But the statute does not define "receipt." The EEOC regulations are no more specific.[3] Though requiring the EEOC or employing agency to "notify an employee or applicant of his right to file a civil action, and of the 30-day time limit for filing,[4] the regulations take no position on the crucial question of whether receipt of a right-to-sue letter by an employee's attorney is notice to the employee of the administrative decision. The government suggests that the triggering event for the thirty-day time period is receipt of the EEOC right-to-sue letter by the claimant or by the office of the claimant's attorney, whichever occurs first. The district court agreed, finding it lacked jurisdiction over

[2] 42 U.S.C. § 2000e-16(c).

[3] *See* 29 C.F.R. § 1613.281-.282.

[4] 29 C.F.R. § 1613.282.

Irwin's Title VII claim because the complaint was filed more than thirty days after the right-to-sue letter arrived at Irwin's attorney's office. Irwin argues that the thirty-day period should not begin running until the claimant receives actual notice of his right to sue, or at least until the attorney has actual notice.

Our analysis begins with *Ringgold v. National Maintenance Corp.*[5] *Ringgold* involved a Title VII action against a private employer, with a ninety-day period for filing suit.[6] In that case, the attorney who filed Ringgold's administrative complaint subsequently left her two-attorney partnership. The EEOC right-to-sue letter arrived at the firm's office on October 6, and was signed for by a relative of the remaining partner. Because the remaining partner was out of town, neither attorney learned about the EEOC decision until October 10. The complaint was filed on January 6, ninety-two days after arrival of the right-to-sue letter. We held that the suit was not timely filed, concluding that "the 90-day period of limitation established by 42 U.S.C. § 2000e-5(f)(1) begins to run on the date that the EEOC right-to-sue letter is delivered to the offices of formally designated counsel or to the claimant."[7]

Irwin argues that we should not apply the constructive notice rule of *Ringgold* to his Title VII action against the federal government. He notes the longer period in which to file suit against a private employer. Further,

[5] 796 F.2d 769 (5th Cir.1986).

[6] 42 U.S.C. § 2000e-5(f)(1).

[7] *Ringgold*, 796 F.2d at 770.

while the ninety-day period of § 2000e-5(f)(1) is subject to equitable tolling,[8] the thirty-day span allotted under § 2000e-16(c) operates as an absolute jurisdictional limit.[9] In Irwin's view, constructive notice would add an unnecessary burden to a federal employee's Title VII rights.

Our task, of course, is to discern congressional intent. Having found the constructive notice doctrine applicable under § 2000e-5(f)(1) in *Ringgold*, we see no reason to believe Congress intended a different result in suits against the government than in suits against private employers. We have adopted a "system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.' "[10] This basic policy choice is reflected in Fed.R.Civ.P. 5(b), making service of papers on a party's attorney the normal procedure. Congress enacted § 2000e-16(c) against this background. We are persuaded that the sufficiency of notice to a person's lawyer is so ingrained that we should expect Congress to say so if it intends a different rule. Nor is the thirty-day time limit under this statute more burdensome than many other time limits within which attorneys must operate.

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[8] *Coke v. General Adjustment Bureau, Inc.*, 640 F.2d 584, 592-93 n. 15 (5th Cir.1981).

[9] *Bell v. Veterans Administration Hosp.*, 826 F.2d 357, 360-61 (5th Cir.1987).

[10] *Link v. Wabash R.R. Co.*, 370 U.S. 626, 634, 82 S.Ct. 1386, 1390, 8 L.Ed.2d 734 (1962) (quoting *Smith v. Ayer*, 101 U.S. (11 Otto.) 320, 326, 25 L.Ed. 955 (1879))

Irwin also relies on our decision in *Cooper v. Lewis*,[11] where we determined that notice to an attorney would not be imputed to the employee for purposes of a fifteen-day time period governing appeals from an employing agency to the Civil Service Commission Appeals Review Board. The fifteen-day limit was not statutory, but rather was created by the agency pursuant to its rulemaking authority. We interpreted the regulation to require actual notice to the claimant as the triggering event. In doing so, we were persuaded that the regulation comfortably abided our charge to liberally construe the provisions of Title VII.

In *Cooper*, we relied on three cases from other circuits interpreting § 2000e-16(c), the statute now before us. In *Bell v. Brown*,[12] a divided panel of the D.C. Circuit read "receipt" in § 2000e-16(c) to mean receipt by the employee, relying on the principle of liberal construction of remedial statutes. It also rested its decision on judicial deference to administrative construction of the statute, arguing that the "Civil Service Commission's interpretations of that section have consistently reflected the theme that the 30-day period for suit is not set in motion until notice of the final administrative action is obtained by the affected employee, irrespective of when it might reach a representative."[13] The dissent emphasized that parties are generally deemed to have notice of facts known to their attorneys.[14]

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[11] 644 F.2d 1077 (5th Cir. Unit A May 1981).

[12] 557 F.2d 849 (D.C.Cir.1977).

[13] *Id.* at 854.

[14] *Id.* at 857-58 (Robb, J., dissenting).

In *Craig v. Department of Health, Education & Welfare,*[15] the Eighth Circuit followed *Bell,* giving the same two reasons for its decision. However, it carved out an exception where a certified letter is sent to a representative designated by the employee, addressed in accordance with the employee's specific directions, and the representative personally acknowledges receipt of the notice. In *Rea v. Middendorf,*[16] the Sixth Circuit relied on *Bell* to affirm dismissal of a Title VII complaint, reasoning that the thirty-day period began running when the employee received notice of the adverse administrative decision, and not from the later date when his attorney received notice.

In *Cooper,* we expressed approval for the holdings of *Bell, Craig* and *Rea* in dicta:

> [S]ince the Commission did not intend the fifteen-day time period established by Commission regulations to commence upon receipt of notice by the complaint's representative, and since that interpretation comports with the policy that the Act should be liberally construed in favor of those that it is designed to protect, we are compelled to hold that the constructive notice doctrine is inapplicable here. While the Sixth, Eighth, and D.C. Circuit cases dealt with the statutory thirty-day time period, *we find their reasoning applicable here and agree with their result.* Indeed, we find that result even more compelling here where the court is dealing with a Commission regulation that establishes an extremely short period within which an employee may appeal to the Review Board and that anticipates

[15] 581 F.2d 189 (8th Cir.1978).

[16] 587 F.2d 4 (6th Cir.1978).

> that notice to the employee – not his representative – will trigger the running of the limitation period. Therefore, we hold that in the present case, the fifteen-day time period established by Commission regulations for federal employees to appeal to the Civil Service Commission Appeals Review Board began to run when the employee received the notice.[17]

Irwin invites us to take the next step of turning *Cooper's* dicta into holding. We decline the invitation. Forced to choose between *Ringgold* and *Cooper,* we find *Ringgold* more analogous to our present inquiry. *Cooper,* after all, involved construction of a regulation adopted by the relevant administrative agency. Thus, *Cooper's* primary focus was upon the intent of the Civil Service Commission. Our task, as in *Ringgold,* is to determine Congressional intent without the assistance of a regulator's interpretive effort.

Further, when *Bell, Craig* and *Rea* were decided, regulatory authority under this statute rested with the Civil Service Commission. Those cases relied on CSC regulations, which specifically stated that the employee could file a civil action "[w]ithin thirty (30) calendar days of *his* receipt of notice of final action" taken by his agency or by the Commission on his complaint.[18] Since them, regulatory authority has been shifted to the Equal Employment Opportunity Commission.[19] While the EEOC adopted

[17] *Cooper,* 644 F.2d at 1085 (emphasis supplied).

[18] *See* 37 Fed.Reg. 25,699 (1972) (text of 5 C.F.R. § 713.281(a), (c) (emphasis supplied)); *Rea,* 587 F.2d at 5 (quoting 5 C.F.R. § 713.281(a)).

[19] *See* 43 Fed.Reg. 60,901 (1978).

many of the CSC's regulations verbatim, this particular regulation was soon modified by dropping the word "his" from in front of "receipt."[20] Thus, the current regulation does not specify whose receipt of notice triggers the thirty-day time clock for filing a civil action.[21] Without an authoritative administrative interpretation of the statute, much of the rationale for *Bell*, *Craig* and *Rea* disappears. *Cooper* also becomes less persuasive, since it involved interpretation of a CSC regulation, rather than its EEOC counterpart, and since it rested on *Bell*, *Craig* and *Rea* in reaching its result. Thus, we apply the constructive notice doctrine of *Ringgold*, and find that the district court lacked jurisdiction over Irwin's Title VII claim.

II

Irwin next asserts that the district court erred when it dismissed his claims under 42 U.S.C. §§ 1985 and 1986. The district court based its decision on *Brown v. General Services Administration*,[22] which held that Title VII provides the exclusive remedy for claims of employment discrimination filed against the federal government. Irwin admits the principle, but insists that he pled claims under §§ 1985 and 1986 which were sufficiently distinct from employment discrimination claims to avoid the bar

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[20] *See* 45 Fed.Reg. 24,133 (1980) (text of 29 C.F.R. § 1613.281(a), (c)).

[21] 29 C.F.R. § 1613.281.

[22] 425 U.S. 820, 835, 96 S.Ct. 1961, 1969, 48 L.Ed.2d 402 (1976).

of *Brown*. We need not decide the scope of *Brown*. To rely on § 1985, a plaintiff must plead the operative facts upon which his claim is based, more than conclusory allegations.[23] If Irwin intended to plead claims sufficiently distinct from the employment context to escape *Brown*, he has not done so with the required degree of specificity. Since a § 1985 conspiracy forms an integral part of a claim under § 1986,[24] Irwin's reliance on the latter statute is also undermined.

III

Irwin argues finally that the district court erred in dismissing his age discrimination complaint. We have previously outlined the two "avenues of relief" available to a plaintiff alleging age discrimination in federal employment:

> He may file an administrative complaint with the employing federal agency, and if the employing agency's determination is adverse to him he may appeal to the Civil Service Commission [now the Equal Employment Opportunity Commission] for administrative review. After the administrative complaint has been filed with the Commission, a civil action then may be instituted. Alternatively, the employee has the option under the Act to bypass the administrative process either in part or in its entirety and proceed directly to federal court thirty days after notice of intent to sue has been given to the Commission as long as such notice is given

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[23] *Holdiness v. Stroud*, 808 F.2d 417, 424 (5th Cir.1987).

[24] *See Hamilton v. Chaffin*, 506 F.2d 904, 913-14 (5th Cir.1975).

> "within one hundred and eighty days after the alleged unlawful practice occurred."[25]

The plaintiff must either "seek relief through one of the two avenues described or alternatively claim equitable grounds for not having so proceeded and must prove that the reasons he was prevented from proceeding can be blamed upon the employing agency."[26]

When a defendant makes a "factual attack" on the court's jurisdiction, the plaintiff must "prove the existence of subject-matter jurisdiction by a preponderance of the evidence."[27] An attack is "factual" rather than "facial" if the defendant "submits affidavits, testimony, or other evidentiary materials."[28] The plaintiff is obliged "to submit facts through some evidentiary method" to sustain his burden of proof.[29]

In this case, the government challenged the district court's subject matter jurisdiction over the age discrimination claim in its Amended Motion to Dismiss. The primary thrust of its argument was that exhaustion of remedies is a jurisdictional prerequisite, and that it should have been alleged in his complaint in district court. Appellees also argued, however, that "the evidence . . . submitted to the Court suggests that plaintiff never raised this issue with the EEOC." The government

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[25] *Paterson v. Weinberger*, 644 F.2d 521, 523-24 (5th Cir.1981) (citations omitted).

[26] *Id.* at 524.

[27] *Middle South Energy, Inc. v. City of New Orleans*, 800 F.2d 488, 490 (5th Cir.1986).

[28] *Paterson*, 644 F.2d at 523.

[29] *Id.*

attached Irwin's EEO Counseling Report, which did not mention claims based on age discrimination. The district court ordered the parties to submit evidence on the question of jurisdiction over the Title VII claim, but made no similar request with respect to the other jurisdictional attacks. In reply to the motion to dismiss the age discrimination claim, Irwin argued:

> Defendants next assert that Plaintiff failed to include age discrimination as an element in his administrative proceedings. Plaintiff, in seeking redress through the administrative routes, asserted all claims including those of age discrimination. That the Equal Employment Opportunity Commission in its decision did not directly address Plaintiff's age discrimination claim, is not binding, or should not be found to be binding upon the Plaintiff at this time. Plaintiff asserted through the EEO counsel all matters alleged in Plaintiff's complaint herein, including his age discrimination assertion.

Irwin offered no evidence to back up this claim. The district court treated the attack on its jurisdiction as factual, finding that appellant had neither filed a formal age discrimination complaint with his agency nor given notice of his intent to sue. The court also stated that Irwin offered no reason justifying his failure to give such notice. We affirm.

AFFIRMED.

SUPREME COURT OF THE UNITED STATES

No. 89-5867

Shirley W. Irwin,

Petitioner

v.

Veterans Administration, et al.

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Fifth Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

February 20, 1990

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

SHIRLEY W. IRWIN,

Petitioner,

v.

VETERANS ADMINISTRATION, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MOTION FOR DIVIDED ARGUMENT

Amicus curiae, the National Treasury Employees Union (NTEU), moves for leave to participate with petitioner in divided argument, pursuant to Supreme Court Rules 28.4 and 28.7. We have consulted with petitioner's counsel and are authorized to state that he supports this motion. Amicus and the petitioner propose to address separate issues and to divide the time allotted for oral argument equally between them. A grounds for its motion NTEU states as follows:

1. There are two issues raised in this case. The first is whether the 30-day time limit for filing suit against a federal agency under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-16(c), is jurisdictional, or is, like its private-sector counterpart, in the nature of a statute of limitations that is subject to waiver and equitable tolling. The second issue is whether the 30-day period begins to run when the complainant or his attorney receive actual notice of the final administrative disposition of the complaint, or, as the court of appeals held, when notice is received by the attorney's office.

2. Amicus, NTEU, is a federal sector labor union that is the exclusive bargaining representative of approximately 140,000 federal employees nationwide. NTEU frequently represents employees in litigation before administrative and judicial tribunals, including cases arising under Title VII and other anti-discrimination provisions. Because the issues presented in this case are extremely important to federal employees who pursue employment discrimination complaints, and because we believe that the lower court's decision frustrates enforcement of the equal opportunity laws in the federal workplace, NTEU filed a brief, amicus curiae, on the side of petitioner, urging reversal.

3. NTEU's participation in the oral argument of this case would offer a valuable and unique perspective that would aid the Court's decisionmaking process. NTEU counsel are well-versed in Title VII law, and in the history of the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103, which

extended the protections of Title VII to federal employees. In addition, NTEU counsel are particularly familiar with the highly complex procedural rules which govern the Title VII complaint process in the federal sector, and are uniquely qualified to provide information about related questions of federal personnel law, which may be important to the Court's understanding of this case. Moreover, NTEU's participation in oral argument would assist the Court because the Union's extensive experience as the worksite representative of 140,000 federal employees enables it to impart practical information about the obstacles those employees face when they pursue anti-discrimination complaints.

4. Division of argument is particularly feasible in this case because while the two issues accepted for review are interrelated, they are analytically distinct. Petitioner and amicus propose to have NTEU take primary responsibility for presenting argument on the first issue--whether the 30-day time period is jurisdictional--and to have petitioner's counsel address the second question regarding the date the thirty-day period begins to run.

5. Finally, we note that this Court recently granted a similar motion for divided argument filed by NTEU. See Department of the Treasury v. Federal Labor Relations Authority, No. 88-2123 (decided April 17, 1990). In addition, NTEU counsel presented oral argument in National Treasury Employees Union v. Von Raab, 109 S.Ct. 1384 (1989) and in Bowsher v. Synar, 475 U.S. 1009 (1986).

On the basis of the foregoing, NTEU respectfully requests that its motion for divided argument be granted.

Respectfully submitted,

GREGORY O'DUDEN
Director of Litigation

ELAINE KAPLAN
Deputy Director of Litigation

KERRY L. ADAMS
Assistant Director
of Litigation

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May 1990

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

SHIRLEY W. IRWIN, Petitioner	)	
v.	)	No. 89-5867
VETERANS ADMINISTRATION, et al., Respondent.	)	

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the Motion for Divided Argument by mail on May 7, 1990.

Jon R. Ker
P.O. Box 1087
Hewitt, Texas 76643

and hand delivered to:

Solicitor General
U.S. Department of Justice
Washington, D.C. 20530

Gregory O'Duden
Director of Litigation

MAY 7, 1990

Supreme Court, U.S.
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No. 89-5867

In The

Supreme Court of the United States

October Term, 1989

SHIRLEY W. IRWIN,

Petitioner,

v.

VETERAN'S ADMINISTRATION, ET AL.,

Respondents.

On Writ Of Certiorari To
The United States Court Of Appeals
For The Fifth Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. WHETHER THE THIRTY DAY PERIOD FOR FILING SUIT FOR FEDERAL EMPLOYEES PURSUANT TO 42 U.S.C., 2000E-16 IS AN ABSOLUTE JURISDICTIONAL REQUIREMENT, OR, AS IN NONFEDERAL EMPLOYMENT DISCRIMINATION CASES, IN THE NATURE OF A STATUTE OF LIMITATIONS, SUBJECT TO EQUITABLE TOLLING?

2. WHETHER RECEIPT OTHER THAN ACTUAL RECEIPT BY A CLAIMANT OR A CLAIMANT'S ATTORNEY OF THE NOTICE OF FINAL ACTION ISSUED BY THE EEOC IS SUFFICIENT FOR INITIATING THE RUNNING OF THE THIRTY-DAY FILING REQUIREMENT APPLICABLE TO FEDERAL EMPLOYEES UNDER 42 U.S.C., 2000E-16(C)?

LIST OF ALL PARTIES

The parties to the proceeding in the Court of Appeals were: Shirley W. Irwin, Petitioner: Veteran's Administration, an official agency of the United States of America; Irvin D. Noll; Robert L. Cimber; Charles Stenslie; James Strong, Respondents.

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No. 89-5867

In The

Supreme Court of the United States

October Term, 1989

SHIRLEY W. IRWIN,

Petitioner,

v.

VETERAN'S ADMINISTRATION, ET AL.,

Respondents.

On Writ Of Certiorari To
The United States Court Of Appeals
For The Fifth Circuit

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals (J.A. 33) is reported at 874 F.2d 1092. The opinion of the District Court (J.A. 32) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 13, 1989. The order by the Court of Appeals

denying the Petition for Rehearing was entered on July 13, 1989. The Petition for Writ of Certiorari was filed on October 10, 1989. This Court granted the Petition on February 20, 1990. The Court's jurisdiction is invoked under **28 U.S.C. 1254(1).**

RELEVANT STATUTORY PROVISIONS

The pertinent and relevant provisions of **42 U.S.C. 2000e-16(c)** are set out verbatim, together with appropriate citation therefor in the Appendix.

STATEMENT OF THE CASE

This case was brought against the Veterans Administration pursuant to **42 U.S.C. 2000e-16** and **29 U.S.C. 621** by one of its employees claiming discrimination on the basis of age and handicap, as well as for retaliation for his seeking redress for past acts of discrimination by the agency. Irwin also sought actions against individual named defendants under **42 U.S.C. 1985 and 1986.** Further, Irwin alleged that his constitutional rights under the First and Fifth Amendments had been violated by the individual Defendants.

(i) COURSE OF THE PROCEEDINGS

This case was dismissed by the District Court by two separate orders of dismissal involving all of Appellant's claims (J.A. 32). From these orders of dismissal Irwin appealed. The Fifth Circuit Court of Appeals held that the

filing period stated in **42 U.S.C. 2000e-16(c)** was an absolute jurisdictional requirement and receipt at the office of Petitioner's attorney, rather than actual receipt of notice by the claimant or personally by his attorney, began the running of the 30-day period for filing a complaint under Title VII. The Court below also determined that Irwin did not sufficiently plead claims under **1985 and 1986** distinct from Title VII so as to maintain actions against the individual defendants, and that the District Court did not have jurisdiction over the age discrimination claim since it was not recorded by the EEO Counsellor that Irwin filed a formal age discrimination complaint against his agency. Irwin here does not challenge the decision concerning claims under **1985 and 1986**, the constitutional claims or the age discrimination complaint.

(ii) STATEMENT OF THE FACTS

For clarity, Petitioner includes here a synopsis of transactions leading up to the filing of Petitioner's complaint:

Petitioner, a handicapped former employee of the Veterans Administration Medical Center, Waco, Texas, while employed had administratively registered complaints of improper conduct and wrongdoing by certain employees at the VAMC. As a result of these complaints of wrongful conduct by others, efforts were made by the individual defendants to obtain Irwin's voluntary retirement by offering him the alternatives of early retirement or termination. Based upon information supplied to Irwin respecting the amount of retirement pay he would receive, which representation proved false and misleading, Irwin retired. When the anticipated retirement receipt

proved not forthcoming, Irwin appealed to the Merit Systems Protection Board his retirement decision. It was found that Irwin's retirement had been involuntarily made. The Merit Systems Protection Board set aside his retirement and reinstatement of employment was ordered.

When Irwin returned to work he was in short order terminated, with a termination date of April 17, 1986. Irwin, on the day of his termination, began attempts to locate and contact the EEO Counselor at the V.A. Medical Center and an appointment was made by the Counselor for a time after 30 days from Irwin's termination. The EEO Counsellor set an appointment for Irwin for June 23, 1986. Irwin thereafter filed his appeal through the EEOC which entered its decision on March 19, 1987 dismissing the appeal for failure to contact the EEO Counselor within 30 days from the event of discrimination.

Notice of the decision by the EEOC was received by the office of Jon R. Ker, attorney for Irwin on March 23, 1987. However, on March 22, 1987, Mr. Ker had departed his office and Waco, Texas for active duty with his U. S. Army Reserve Unit for training within the Republic of Korea. Actual notice of the EEOC's final action and notice of right to sue was not had by Ker until April 10, 1987. Irwin's attorney is a sole practitioner. Irwin filed his affidavit in response to the Trial Court's request (J.A. 9) indicating to Irwin's best information he received the notice from EEOC on April 7, 1987 (J.A. 12). However, the envelope received by Irwin indicates an April 7, 1987 date upon it (J.A. 8). The return receipt signed by Irwin was never produced by the agency.

Suit was filed in the United States District Court for the Western District of Texas on May 6, 1987, within thirty days of actual receipt by Irwin and Attorney Ker of the notice of right to sue of the EEOC, but more than thirty days after receipt at the office of Attorney Ker.

SUMMARY OF THE ARGUMENT

It is well established that Title VII actions in the private sector are subject to waiver, estoppel and equitable tolling. Therefore, the filing periods applicable to the private sector both for contacting the EEOC for the purposes of filing an initial charge and for the purposes of filing suit in the District Court are not jurisdictional, but rather akin to a statute of limitations. When Congress enacted the amendments to the Civil Rights Act of 1964 clearly establishing access by federal employees to the courts, it intended that the filing period applicable to such federal employees would likewise be subject to waiver, estoppel and equitable tolling. The rationale utilized by this court in establishing that the private sector Title VII filing periods are not jurisdictional is applicable to Title VII suits in the public sector. The remedial character of the act calls for liberal construction and interpretation to assure that the purposes of the statute are achieved and that the interests of the protected class are preserved.

Even if the filing period for federal employees is found to be jurisdictional, the time of initiation of the 30-day filing period properly begins from the time of actual receipt and notice to the federal employee claimant, or at

a minimum, from the time of actual receipt and notice to the claimant's attorney under specified circumstances. The remedial nature of Title VII should require actual notice to the claimant in order that the claimant's rights be protected from loss due to circumstances beyond the claimant's control. The requiring of actual notice and receipt by the attorney for claimant, if the doctrine of constructive notice is applied to Title VII actions by federal employees, comports with the rationale of interpreting the remedial statute in favor of claimants thereunder. Even if Congress intended that constructive notice apply to suits by federal employees under Title VII, it did not intend that constructive notice upon constructive notice be applicable.

ARGUMENT

I

WHETHER THE 30-DAY PERIOD FOR FILING SUIT FOR FEDERAL EMPLOYEES PURSUANT TO 42 U.S.C. 2000e-16 IS AN ABSOLUTE JURISDICTIONAL REQUIREMENT, OR, AS IN NON-FEDERAL EMPLOYMENT DISCRIMINATION CASES, IN THE NATURE OF A STATUTE OF LIMITATIONS, SUBJECT TO EQUITABLE TOLLING?

In *Zipes vs. Transworld Airlines, Inc.*, 455 U.S. 385, 102 S. Ct. 1127, 71 L.Ed.2d 234 (1982), this Court held that the timely filing of an employment discrimination charge with the Equal Employment Opportunity Commission (EEOC) was not a jurisdictional prerequisite to a suit under Title VII of the Civil Rights Act of 1964 against private employers. The time limit for the filing of a

charge of discrimination was, therefore, found to be subject to waiver, estoppel, and equitable tolling. Later, this Court addressed the period for filing suit applicable to private sector actions under Title VII. While determining under the facts of that case equitable tolling was not to be applied, still the reasoning of the court showed that the 90-day period for private sector actions was not jurisdictional. *Baldwin County Welcome Center vs. Brown*, 466 U.S. 147; 104 S. Ct. 1723; 80 L.Ed.2d 196 (1984)(per curiam).

Against this settled backdrop relating to private sector suits, the circuits are in conflict as to the characterization of the 30-day filing period of **42 U.S.C. 2000e-16(c)** applicable to discrimination suits of federal employees. The Fifth Circuit below continued its prior holding that the 30-day period operates as an absolute jurisdictional limit. *Irwin vs. Veterans Administration*, 874 F.2d 1092 (5th Cir. 1989)[1] The Seventh Circuit has likewise held the time limits promulgated concerning federal employment discrimination are jurisdictional. In *Sims vs. Heckler*, 725 F.2d 1143 (7th Cir. 1984) the court there addressed the issue of the requirement that a federal employee asserting employment discrimination must contact an Equal Opportunity Counselor within thirty (30) days of the incident giving rise to his claim, and held that such 30-day time limit is jurisdictiona1.[2] The Ninth Circuit seems to

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[1] See also *Bell vs. Veterans Administration Hospital*, 826 F.2d 357 (5th Cir. 1987); *Eastland vs. Tennessee Valley Authority*, 553 F.2d 364 (5th Cir. 1977), cert. denied, 443 U.S. 985, 98 S.Ct. 611, 54 L.Ed.2d 479 (1977).

[2] The Court there construed 29 CFR 1613.214(a)(1)(i) which states in pertinent part that a federal agency may accept

(Continued on following page)

indicate that the 30-day time limit of **Section 2000e-16(c)** is jurisdictional. *Rice vs. Hamilton Air Force Base Commissary,* 720 F.2d 1082 (9th Cir. 1983). Footnote number 1 in that case states that it was not necessary for the court there to address and reexamine its holdings that Title VII civil suit filing periods are jurisdictional, while within the same breath discussing the effect of *Zipes,* thereby leaving a question mark as to where the Ninth Circuit now stands on this issue.[3]

The opposite position concerning the jurisdictional characterization question is taken by the Sixth, Tenth, Eleventh and D.C. Circuits. See *Boddy vs. Dean,* 821 F.2d 346 (6th Cir. 1987) (concerning the time limit for contacting an EEO counselor by a federal employee under 29 CFR 1613.214(a)); *Martinez vs. Orr,* 738 F.2d 1107 (10th Cir. 1984) (concerning **42 U.S.C. 2000e-16(c)**(Citing *Zipes*)); *Milam vs. United States Postal Service,* 674 F.2d 860 (11th Cir. 1982) (stating at page 862 that the Fifth Circuit holding in *Eastland vs. Tennessee Valley Authority,* supra, that

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a discrimination complaint only if "the complainant brought to the attention of the Equal Opportunity Counselor the matter causing him to believe he had been discriminated against within 30 calendar days of the date of that matter or, if a personnel action, within 30 calendar days of its effective date."

[3] In a later case concerning the issue of the time limit for contacting an EEO counselor under 29 CFR 1613.214(a)(i), the Ninth Circuit there treated the time limit as a statute of limitations subject to waiver, estoppel and equitable tolling relying upon *Zipes. Boyd vs. United States Postal Service,* 752 F.2d 410 (9th Cir. 1985), at page 414.

2000e-16(c) was jurisdictional, was no longer good law in view of *Zipes*); and *Saltz vs. Lehman,* 672 F.2d 207 (D.C. Cir. 1982) (concerning the time limit for filing with the EEOC).

Petitioner asserts that the rationale of *Zipes* and *Baldwin County Welcome Center,* is properly applicable to public sector Title VII actions. Moreover, the circuit cases holding that the filing period here in question is not jurisdictional are correct and persuasive. It should now be resolved that the filing period contained within **42 U.S.C. 2000e-16(c)** is subject to waiver, estoppel and equitable tolling.

In interpreting the statutory provision "within thirty (30) days of receipt of notice of final action"[4], neither the statute nor the legislative history provides much in the way of guidance. However, as noted by the Tenth Circuit in *Martinez*[5]:

> "The legislative history of the amendment indicates that in extending the coverage of Title VII to federal employees, Congress intended to give them essentially the same rights and remedies as had been provided employees in the private sector." 1972 *U.S. Code Cong. & Ad. News* 2137, at 2157-60.

In Footnote 2 of the opinion, the *Martinez* court went further and stated:

> "The House Report emphasizes that Equal Employment Opportunity is of 'paramount significance' in the Federal Service. H. R. Rep. #238,

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[4] **42 U.S.C. 2000e-16(c).**

[5] 738 F.2d at 1110

92nd Cong., 2nd Sess., reprinted in 1972 *U.S. Code Cong. & Ad. News* 2137, 2157. Noting that present laws 'do not permit industry and labor organizations to be the judges of their own conduct in the area of employment discrimination' the report concludes that '[t]here is no reason why government agencies should not be treated similarly'. Ibid at 2159-60."[6]

Where, as here, Congressional purposes are unclear, the Courts have traditionally resolved ambiguities in remedial statutes in favor of those whom the legislation was designed to protect. *Laffey vs. Northwest Airlines, Inc.*, 567 F.2d 429 (D.C. Cir. 1976). Title VII, being remedial in character, should here be liberally construed to achieve its purpose as it pertains to federal employment. And where the statutory framework results in procedural ambiguity, those ambiguities are generally, and should be, resolved in favor of the complaining party. *Bell vs. Brown*, 557 F.2d 849 (D.C. Cir. 1977).

> "That approach . . . reflects not only the manifest importance of Title VII rights to complaining parties, but also the broad national commitment to eliminating such discrimination and the importance of private suits in fulfilling that commitment."[7]

A finding now by this Court extending the *Zipes* rationale to the federal employment sector and establishing clearly that the time limit of **2000e-16(c)** is not jurisdictional but rather subject to waiver, estoppel and equitable tolling would promote the remedial nature of the act. Such a conclusion now would prevent Title VII

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[6] 738 F.2d at 1110.

[7] *Bell*, 557 F.2d at 853.

federal employee claimants from losing their actions by virtue of fortuitous circumstances beyond their control.

II

WHETHER RECEIPT OTHER THAN ACTUAL RECEIPT BY A CLAIMANT OR A CLAIMANT'S ATTORNEY OF THE NOTICE OF FINAL ACTION ISSUED BY THE EEOC IS SUFFICIENT FOR INITIATING THE RUNNING OF THE 30-DAY FILING REQUIREMENT APPLICABLE TO FEDERAL EMPLOYEES UNDER 42 USC 2000e-16(c)?

Even if it is now determined that the 30-day filing period applicable to federal employees under Title VII indeed be jurisdictional, the issue remains as to what is the triggering event for the initiation of that 30-day period, an issue which also has resulted in conflicting opinions among the circuits.

In *Irwin*, the Fifth Circuit relied upon its decision in *Ringgold vs. National Maintenance Corp.*, 796 F.2d 769 (5th Cir. 1986), a private employee action subject to the longer period for filing suit, to hold that constructive notice under **2000e-16(c)** applied from time of receipt at the claimant's attorney's office of the notice of right to sue irrespective of actual knowledge or receipt by the claimant or claimant's attorney. Thus, at least within the Fifth Circuit, no actual notice is required to the claimant or claimant's attorney for the 30-day filing time limit to begin. Indeed, this holding by the court below takes what Petitioner asserts as an unreasonable position of imputing constructive notice to claimant's attorney which likewise binds the claimant even in the absence of actual notice to the attorney.

The opposite result in interpreting "receipt of notice" under the act is reached in the District of Columbia Circuit and the Sixth Circuit. In these circuits the actual notice to the claimant is the sole triggering event. In *Bell vs. Brown*, supra, the D. C. Circuit stated:

> "Since the 'receipt of notice' and not its mailing, is expressly made the event inaugurating the 30-day period, plainly it begins to run only from the time the notice comes into the recipient's hands. The statutory language, however is non-committal as to whether receipt by a representative is equivalent for this purpose to receipt by the employee, and the legislative history, though extensive, yields no significant indication in this regard."[8]

> " . . . A reading of 'receipt' as a call for personal receipt by the affected employee, harmonizes well with the fundamental objectives of **717(c)**. It comports, too, with the every day realities of Title VII litigation."[9]

> " . . . As much here as in *Coles* (*Coles vs. Penny*, 531 F.2d 609, at 615), 'we doubt that Congress intended to provide a judicial remedy – [which] require[s] de novo consideration – which is so easily forfeited by those whose rights it vindicates. . . . A statutory construction likely in so many cases to render meaningless the provision of a judicial remedy is hardly the 'practical and reasonable' one that we should seek."[10]

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[8] *Bell*, 557 F.2d at 852-53

[9] Ibid at 853

[10] Ibid at 854

While the *Bell* court did recognize the imputation of notice generally from attorney to client, still it determined that in tying the commencement of the suit period to "receipt of notice" the Congress in Title VII actions contemplated an actual notice to the litigant:

> "Put another way, we cannot believe that Congress willed the subversion of Section 717(c) by an incompatible invocation of imputed notice.[11]

Like the D.C. Circuit, the Sixth Circuit has determined that receipt of notice pursuant to **42 U.S.C. 2000e-16(c)** contemplates actual notice by the complainant. In relying upon *Bell vs. Brown*, supra, the Sixth Circuit stated in *Rea vs. Middendorf*, 587 F.2d 4 (6th Cir. 1978), at page 5:

> "Thus, although notice must be given to the representative, if any, the date of this notice is not the determinative date for initiation of the 30-day filing period."[12]

A hybrid approach has been reached by the Seventh and Eighth Circuits. The Ninth Circuit, on the other hand,

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[11] Ibid at 857. Compare *Brown vs. National Highway Traffic Safety Administration*, 673 F.2d 544 (D.C. Cir. 1982) which case concerned the filing period found in **5 U.S.C. 7703**, finding that actual notice to complainant is required, citing *Bell*. See also *Josiah-Faeduwor vs. Communications Satellite Corp.*, 785 F.2d 344 (D.C. Cir. 1986); *Cooper vs. Lewis*, 644 F.2d 1077 (5th Cir. 1981).

[12] See also *Com. of Ky. Ex. Rel. Cabinet for Hum. Res. vs. Brock*, 845 F.2d 117 (6th Cir. 1988), footnote 3 which characterizes Congress as having elected to require actual notice of final administrative action to commence the accrual of limitations concerning **42 U.S.C. 2000e-16(c)**, at page 121.

while not being as clear as the Seventh and Eighth Circuits, has indicated that notice to the attorney of a right to sue initiates the running of the 30-day time limit where that attorney had requested the issuance of the notice of right to sue letter. See *Gonzales vs. Stanford Applied Engineering, Inc.*, 597 F.2d 1298, 1299 (9th Cir. 1979) (per curiam).

In *Craig vs. Department of Health, Education and Welfare*, 581 F.2d 189 (8th Cir. 1978) the Eighth Circuit, too, relied upon *Bell vs. Brown*, supra, to hold that the Equal Employment Opportunity Act should be liberally construed since it is a remedial statute. The Court there, however, differed from *Bell* by finding specific circumstances under which notice to the designated representative would satisfy the requirement of the statute and begin the running of the filing period. The Court found that notice was sufficient if: (1) a registered or certified letter or other written notice requiring the recipient to acknowledge receipt therefor, is sent to the employee, and the employee personally acknowledges such receipt; or (2) a registered or certified letter or other written notice requiring the recipient to acknowledge receipt therefor, is sent to the representative designated by the employee. In this instance the Court specified that the notice must be addressed in accordance with the specific directions of the employee and receipt must be acknowledged personally by the designated representative.[13]

The Seventh Circuit, in addressing the longer filing period for the private sector discriminatee reached a

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[13] *Craig*, 581 F.2d at 193

similar conclusion. In *Jones vs. Madison Service Corp.*, 744 F.2d 1309 (7th Cir. 1984), the Court there stated:

> "We believe that the most crucial concept in this matter, and a concept that determined many of these decisions, including [*Archie vs. Chicago Truck Drivers, Helpers and Warehouse Workers Union*, 585 F.2d 210 (7th Cir. 1978)], is the actual knowledge that the time period in which a suit can be filed has commenced. Such knowledge is conveyed equally well through personal receipt of the right to sue letter by the Claimant and through receipt of that letter by the attorney representing him in the action.
>
> " . . . With the importance of this consideration in mind, we hold that the 90-day period commences when the attorney receives the letter as long as the following facts are undisputed:
>
> 1. The attorney did in fact represent claimant at the time the letter was received;
>
> 2. The EEOC was notified of that representation by either claimant or the attorney;
>
> 3. The attorney did in fact receive the letter; and
>
> 4. The date on which the letter was received.[14]

Petitioner asserts that the remedial nature of the statute requires actual notice to the Title VII claimant in order to preserve that claimant's action and prevent dismissal due to unfortunate or fortuitous circumstances beyond

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[14] *Jones*, 744 F.2d at 1313-1314. See also *Thomas vs. KATV Channel 7*, 692 F.2d 548 (8th Cir. 1982) requiring personal acknowledgment by the representative in order to bind claimant in a private sector Title VII action.

his control. Therefore, Petitioner urges that this Court reject the position taken by the Fifth Circuit in favor of expanding the effect of *Zipes* to public employment sector litigation under Title VII.

The policy of liberally construing remedial statutes so as to fully protect the intended class, should here be applied to require actual notice to claimant or, at least, actual notice to the claimant's representative of the right to sue letter as being the triggering event for the "receipt of notice". Nor is a different result mandated by *Link vs. Wabash R.R. Company*, 370 U.S. 626, 82 S. Ct. 1386, 8 L.Ed.2d 734 (1962). *Link* did not involve a remedial statute, particularly one with a short period of time for filing suit. Rather, it concerned actions by counsel long after suit had been filed. The objectives of eradicating invidious discrimination in the work place, including the federal work place, should be found to override the more general proposition of *Link* concerning the "system of representative litigation, in which each party is deemed bound by the acts of his lawyer agent and is considered to have notice of all facts, notice of which can be charged upon the attorney." *Link*, 370 U.S. at 634.

Further, requiring actual notice to the claimant, or at least to the claimant's representative, in furtherance of protecting an intended class under the remedial statute, would not require that *Link* be overturned. By requiring actual notice as the triggering event for the 30-day filing period, Petitioner urges that this Court would be furthering the remedial spirit as well as correctly interpreting the language of the statute and the intent of Congress.

As additional support for this position the Court may look to cases interpreting the administrative regulations promulgated since the enactment of Title VII.

> "There is another guidepost to proper interpretation of the 'receipt of notice' upon which **Section 717(c)** trades. The Civil Service Commission's interpretations of that section have consistently reflected the theme that the 30-day period for suit is not set in motion until notice of the final administrative action is obtained by the affected employee, irrespective of when it might reach a representative. That should dispel any lingering doubt as to the construction that the section should command in the courts.[15]

While the Petitioner here is cognizant that the Bell court was reviewing the predecessor of the regulations now in effect[16], the result is the same. Despite the deletion of the words "his" in the current regulation, prior interpretations given by the Civil Service Commission, as best as Petitioner has determined, have followed through the transition to the Equal Employment Opportunity Commission and are followed by it.

As further stated by the *Bell* court:[17]

> "The evident purpose of the notice requirement is to inform that the administrative process has run its course and to admonish that the brief

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[15] *Bell vs. Brown*, 557 F.2d at 854 interpreting 37 Fed. Reg. 22723 (1972), as amended by 37 Fed. Reg. 25699 (1972), and 5 C.F.R. 713.281 and 713.282 (1976)

[16] 29 C.F.R. 1613.281

[17] *Bell vs. Brown*, 557 F.2d at 857

period for initiating a lawsuit is about to commence. Like the Civil Service Commission, we think Section 717(c) contemplates service of notice on the employee. That construction is reasonable enough in light of the many instances of employees never having counsel, and those wherein there may be doubt as to the extent of legal representation – for the administrative phase only, or for all purposes. We share also the position that Section 717(c) additionally requires service on counsel for the employee when so represented as a 'practical necessity if the thirty-day filing requirement is not to become an unintended booby trap.'[18] And especially in view of the tight time limitation on suit, filing, the reality that counsel are often unavailable – for example, because away on business or vacation – and the prospect that a great deal of employment-discrimination litigation will be handled by solo practitioners rather than large firms, there surely would be another unintended booby-trap if the doctrine of imputed notice were allowed to displace the statutory assumption that the employee will be given notice both personally and actually."

Surely Judge Robinson had polished well his crystal ball to envision so clearly the facts involved in this case now under discussion and to foresee the dramatic, if not devastating, effects application of constructive notice would have.

In this case, suit was filed within 30 days of the *actual* receipt of notice by the complainant of his right to sue issued by the EEOC, (J.A. 3) but more than 30 days

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[18] Quoting *Copeland vs. Brennan*, 414 F. Supp. 644 (D.D.C. 1975)

after receipt at the office of Petitioner's counsel. Receipt at the attorney's office was acknowledged by a non-lawyer employee. Petitioner's counsel is a sole practitioner and has no other attorney sharing office space. As stated in his affidavit to the trial court (J.A. 27), Petitioner's counsel had departed Waco, Texas for temporary military duty in the Republic of Korea one day prior to receipt at his office of the notice issued by the EEOC. Actual notice to Petitioner's counsel was subsequent to the actual notice to Petitioner.

The finding by the Fifth Circuit below amounts to constructive notice upon constructive notice since Irwin was bound by receipt by a non-lawyer at a time when the attorney was absent and could not have had actual knowledge of such receipt or act upon the notice received. It is difficult to conceive that Congress, in enacting Title VII, would have intended the remedial relief afforded by the Act to be defeated by circumstances over which a claimant has little or no control but for which the consequences are so severe. Such a harsh rule is the result under the decision of the Fifth Circuit in this case.

Likewise, it is difficult to conceive that requiring personal acknowledgment by a claimant, or at least by claimant's representative, places an onerous burden upon the EEOC. Contrary to the position taken by the Fifth Circuit, Petitioner submits that the remedial purposes intended through the act are more correct as a background for interpreting Congress' intent here than the background of Rule 5b, **Federal Rules of Civil Procedure**.

If the policy of liberally construing the remedial statute to allow full protection to the intended class be applied, the result should be that receipt of notice occurs only upon actual receipt by a claimant or, at a minimum, upon actual receipt by claimant's attorney where the attorney has, in fact, (1) represented claimant through the administrative process, and such representation remains in effect at the time of actual receipt, (2) the EEOC had been notified of that representation, and (3) the notice of right to sue letter issued by the EEOC, if addressed to the attorney, is sent by registered or certified mail and is acknowledged personally by the attorney. This does not place an onerous or unreasonable burden upon the EEOC, but more correctly places the emphasis upon the protection of the intended class. This is the heart and thrust of the remedial statute in question. The effect would also be to protect the claimant without doing away with our representative system of justice. On the other hand, where constructive notice applies other than by actual notice to the attorney, then the claimant is subjected to the unreasonable position of constructive notice upon constructive notice and subject to having his claim terminated through no fault of his own or that of his attorney.

CONCLUSION

For the foregoing reasons, the rulings below should be reversed and this matter remanded to the United States District Court, Western District of Texas, Waco Division, for trial.

Respectfully submitted,

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APPENDIX

42 U.S.C. 2000e-16

TITLE VII CIVIL RIGHTS ACT OF 1964 – SECTION 717(c)

EMPLOYMENT BY FEDERAL GOVERNMENT

" . . . (c) Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Equal Employment Opportunity Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant."

Supreme Court, U.S.
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No. 89-5867 (7)

In the Supreme Court of the United States

OCTOBER TERM, 1989

SHIRLEY W. IRWIN, PETITIONER

v.

VETERANS ADMINISTRATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the time limit of 42 U.S.C. 2000e-16(c), which requires a government employee to file a Title VII employment discrimination suit in federal court within thirty days of receipt of notice of final administrative action on his complaint, is jurisdictional.

2. Whether receipt by the petitioner's attorney's office of notice of final action taken by the EEOC triggers the thirty-day period for filing a Title VII complaint against the federal government within the meaning of 42 U.S.C. 2000e-16(c).

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-5867

SHIRLEY W. IRWIN, PETITIONER

v.

VETERANS ADMINISTRATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 11-16; J.A. 33-43) is reported at 874 F.2d 1092. The opinion of the district court (J.A. 14-21) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 17) was entered on June 13, 1989. A petition for rehearing was denied on July 13, 1989 (Pet. App. 18). The petition for a writ of certiorari was filed on October 10, 1989, and was granted on February 20, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 717(c) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16(c), provides in pertinent part:

> Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, * * * an employee or applicant for employment, if aggrieved by the final disposition of his complaint, * * * may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

STATEMENT

The Veterans Administration Medical Center in Waco, Texas, discharged petitioner Irwin on April 17, 1986. On June 12, 1986, he contacted an Equal Employment Opportunity Counselor complaining of discrimination on the basis of race, age and handicap, as well as retaliation for having previously sought redress for past acts of discrimination by the agency. When his complaint was not resolved to his satisfaction, petitioner filed a formal discrimination complaint with the Veterans Administration. The VA rejected his claim on the ground that he had failed to contact the counselor within thirty days of the alleged discrimination, as required by applicable regulations. See 29 C.F.R. 1613.214(a)(1)(i). Petitioner then appealed to the EEOC, which affirmed the VA's decision on March 19, 1987. J.A. 3-4. Notice of this decision was mailed to petitioner and his counsel on that date.[1] The mailing included the standard "Notice of Right To File A Civil Action." J.A. 4.[2]

Petitioner filed his original complaint in this action on May 6, 1987, alleging that the Veterans Administration discriminated against him because of his race, age, and handicap, in violation of 42 U.S.C. 2000e, 29 U.S.C. 621 *et seq.*, 29 U.S.C. 791 *et seq.*, and the First and Fifth Amendments. J.A. 14.[3] The

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[1] The notice to petitioner may have been delayed in the mail due to his apparent change of address. See J.A. 8.

[2] The right to sue notice specifically informed petitioner that "if you file a civil action, YOU MUST NAME THE APPROPRIATE OFFICIAL AGENCY OR DEPARTMENT HEAD AS THE DEFENDANT. * * * Failure to provide the NAME OR OFFICIAL TITLE of the agency head or, where appropriate, the department head, may result in the loss of any judicial redress to which you may be entitled. (Please note: For this purpose, Department means the overall national organization, such as the now defunct Department of Health, Education, and Welfare, *not* the local administrative department where you might work.) You must be sure that the proper defendant is named when you file your civil action." J.A. 5.

[3] In addition to the Veterans Administration, the complaint named Irvin Noll, Robert L. Cimber, and Charles Stenslie as individual defendants, alleging that they "acted in their individual capacities as well as supervisors for" the Veterans Administration, and conspired to deprive petitioner of the equal protection of the laws, or of equal privileges and immunities under the laws, in violation of 42 U.S.C. 1985 and 1986. J.A. 14; Compl. III, para. 9.

An amended complaint, filed July 28, 1987, added James Strong as a defendant, and included allegations of discrimination under the Age Discrimination in Employment Act of

government moved to dismiss, alleging, *inter alia*, that the district court lacked jurisdiction because the complaint was not filed within the time limit specified in 42 U.S.C. 2000e-16(c). J.A. 9, 17-18.

In response to the district court's request for proof of the date of receipt of notice of the EEOC decision (which included a statement of the right to sue, see J.A. 3-7), petitioner filed an affidavit asserting that he received notice of the EEOC decision by certified mail "on or about" April 7, 1987. J.A. 12-13. For their part, respondents filed a receipt showing that the EEOC decision and notice were delivered to the office of petitioner's attorney and accepted by an employee of the attorney on March 23, 1987. J.A. 18. After considering this evidence, the district court dismissed petitioner's complaint as untimely. J.A. 14-19.[4] In requesting reconsideration of that dismissal,

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1967, 29 U.S.C. 631 and 633a, and of violations of the merit system principles in 5 U.S.C. 2301 and 2302. J.A. 14.

Despite the express warning contained in the right to sue notice (see note 2, *supra*), petitioner did not name the Administrator of the Veterans Administration, who was then Thomas K. Turnage, in either his original or his amended complaint. J.A. 14, 1. During the relevant time period, Irvin Noll was the Director of the Waco, Texas, VA Hospital. Robert Cimber was Chief, Rehabilitation Medicine Service, Charles Stenslie was Personnel Director, and James Strong was Vocational Rehabilitation Therapy Supervisor for the hospital.

[4] The court did not directly address the government's alternative contention that the complaint was defective because it failed to name the Administrator. See Gov't Amended Mot. to Dism. at 7-8 (filed Sept. 17, 1987). The court did state that "[b]ecause Plaintiff is suing the Veterans Administration, an official agency of the United States, jurisdiction under 42 U.S.C. § 2000e-16 is proper." J.A. 17. The failure to name the Administrator was not raised or briefed in the court of

petitioner's attorney filed an affidavit alleging that he was in Korea with his United States Army Reserve unit at that time, and did not actually learn of the decision until he returned to his office on April 10, 1987. J.A. 27-28. The district court denied reconsideration, observing that "[t]he thirty-day filing provision provided by 42 U.S.C. § 2000e-16 is jurisdictional in nature and subject to strict compliance. [Petitioner] has presented no evidence which would constitute an excuse from compliance with the thirty-day provision." J.A. 29.

The court of appeals affirmed. It relied on *Ringgold* v. *National Maintenance Corp.*, 796 F.2d 769, 770 (5th Cir. 1986), which held that, for purposes of Title VII actions against private employers, "the 90-period of limitation established by 42 U.S.C. § 2000e-5(f)(1) begins to run on the date that the EEOC right-to-sue letter is delivered to the offices of formally designated counsel or to the claimant," even if counsel himself did not actually receive notice until later. The court found no reason to apply a different rule to suits alleging violations by federal employers. Accordingly, the court of appeals held that the petitioner received constructive notice of the EEOC final decision when the decision was received at the offices of his counsel by an employee authorized to receive it. Since it also concluded that "the thirty-day span allotted under § 2000e-16(c) operates as an absolute jurisdictional limit" (J.A. 36), the court of appeals determined that the district court lacked jurisdiction over petitioner's Title VII claim. J.A. 40.

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appeals as an alternative ground supporting the district court decision, nor was it noted in our opposition to the certiorari petition.

SUMMARY OF ARGUMENT

Section 2000e-16(c) states in plain terms that an aggrieved federal employee may file a civil action "[w]ithin thirty days of receipt of notice of final action taken" by the employing agency or the EEOC. No provision is made for extending that time period; instead, the statutory language in terms specifies a mandatory pre-condition to suit. Statutory time limits on suits against the government delimit the sovereign's consent to be sued and, hence, define the courts' jurisdiction.

There is, in any event, no reason to read into the plain statutory language exceptions that it does not contain. Petitioner argues that the 90-day limit applicable to private sector suits is subject to equitable tolling, and that therefore the 30-day limit applicable to suits against the government should be as well. Suits against the sovereign, however, are not the same as suits against private parties.

The reference in Section 2000e-16 to Section 2000e-5 makes the relevant procedural provisions that are applicable in private sector suits applicable as well in the government context, but it does not indiscriminately incorporate all subsequent interpretations of those provisions, without regard to considerations of sovereign immunity. The general congressional intent in enacting the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103, was to extend to federal employees the rights guaranteed to private sector employees in Title VII. As this Court recognized in *Library of Congress* v. *Shaw*, 478 U.S. 310 (1986), that general intent does not constitute a broad waiver of sovereign immunity incorporating all the unspecified details of the private Title VII remedy into the remedies provided federal

employees. It would be inappropriate to find an overarching intent to treat private sector and government suits the same—particularly with respect to time limits—since Congress itself differentiated between private and governmental employees by providing the latter with a significantly shorter time limitation. Compare 42 U.S.C. 2000e-5(f)(1) (90 days) with 42 U.S.C. 2000e-16(c) (30 days).

Title VII, like other statutes placing the United States in the same position as a private party, must be interpreted consistently with principles of sovereign immunity. Accordingly, cases interpreting time limits in Title VII provisions applicable in the private sector should not automatically be applied to time limits that define the sovereign's consent to suit. In any event, *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385 (1982)—the private sector case upon which petitioner and amicus National Treasury Employees Union chiefly rely—is based on policy concerns that are inapplicable to time limits governing the judicial review of claims by federal employees.

The thirty-day time limit was triggered here when notice of the EEOC decision and the right to sue were delivered to the offices of petitioner's designated counsel. Congress enacted Section 2000e-16(c) in the context of our familiar system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent, and notice to the attorney constitutes notice to his client. See Fed. R. Civ. P. 5(b). Because it is important that triggering events be easily and objectively determinable, it would be particularly undesirable to adopt a rule that the time limitation does not start to run until the attorney or client actually reads the right to sue notice.

ARGUMENT

I. THE THIRTY-DAY TIME LIMIT FOR FILING A FEDERAL EMPLOYMENT DISCRIMINATION COMPLAINT IN DISTRICT COURT UNDER 42 U.S.C. 2000e-16(c) IS JURISDICTIONAL

A. By Its Terms, The Thirty-Day Limitation Of Section 2000e-16(c) Is A Mandatory Precondition To Suit

Petitioner's suit is barred by the plain terms of Section 2000e-16(c). As with any statute, the starting point for interpreting 42 U.S.C. 2000e-16(c) is the language of the statute itself. *Hallstrom* v. *Tillamook County*, 110 S. Ct. 304, 308 (1989); *Gwaltney of Smithfield* v. *Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 56 (1987); *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 432 n.12 (1987); *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Section 2000e-16(c) provides that a federal employee claiming discrimination against the government under Title VII may obtain judicial review of his claim by filing a complaint in district court "[w]ithin thirty days of receipt of notice of final action taken by * * * the Equal Employment Opportunity Commission upon an appeal from a decision or order of [the appropriate] department, agency, or unit." The statute offers no alternative means of obtaining judicial review, and does not suggest that the time limit may be tolled on the basis of equitable factors.[5] Therefore, the filing of a com-

[5] Cf. *Weinberger* v. *Salfi*, 422 U.S. 749, 763-764 (1975) (construing 42 U.S.C. 405(g) to be a statute of limitations subject to waiver and equitable tolling because it provides that after a hearing before the Secretary, any individual "may obtain review of [the Secretary's] decision by a civil action commenced within sixty days after the mailing to him of notice of such decision *or within such further time as the Secretary may allow*" (emphasis added)). The absence of any provision in Section 2000e-16(c) for equitable modification of the filing deadline strongly suggests that Congress intended the traditional sovereign immunity rules to apply.

plaint in district court within the thirty-day limitation is a mandatory, not an optional, precondition to suit. Cf. *Hallstrom* v. *Tillamook County*, 110 S. Ct. at 309 (Court is "not at liberty to create an exception [to mandatory precondition to suit] where Congress has declined to do so"). Compliance with the thirty-day limit is thus a "jurisdictional prerequisite" for judicial review of federal employment discrimination claims. See *Fair Assessment in Real Estate Ass'n* v. *McNary*, 454 U.S. 100, 137 (1981) (Brennan, J., concurring in judgment) (noting that when the exhaustion of state remedies is a mandatory precondition to suit, it is "in that sense a 'jurisdictional prerequisite' ").

This Court, moreover, repeatedly has stressed that "strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." *Mohasco Corp.* v. *Silver*, 447 U.S. 807, 826 (1980). See also *United States* v. *Locke*, 471 U.S. 84, 101 (1985) ("if the concept of a filing deadline is to have any content, the deadline must be enforced"); *Baldwin County Welcome Center* v. *Brown*, 466 U.S. 147, 152 (1984) ("Procedural requirements established by Congress for gaining access to the federal courts are not to be disregarded by courts out of a vague sympathy for particular litigants."). Thus, "[a]s a general rule, if an action is barred by the terms of a statute, it must be dismissed," *Hallstrom* v. *Tillamook County*, 110 S. Ct. at 311, even if the plaintiff is a Title VII complainant. *Ibid.*, citing *Baldwin County Welcome Center* v. *Brown*, *supra*.

Faithful adherence to statutory time limitations is particularly crucial in suits against the government. Time limitations specified by Congress are conditions of the sovereign's consent to suit. As such, they define the extent of the court's jurisdiction and, accordingly, must be strictly observed. *United States* v. *Mottaz*, 476 U.S. 834, 841 (1986); *Soriano* v. *United States*, 352 U.S. 270, 276 (1957). See *Sims* v. *Heckler*, 725 F.2d 1143, 1145-1146 (7th Cir. 1984); *Rice* v. *Hamilton Air Force Base Commissary*, 720 F.2d 1082, 1083 (9th Cir. 1983).

B. There Is No Reason To Ignore The Plain Terms Of Section 2000e-16(c)

Neither petitioner nor amicus curiae National Treasury Employees Union (NTEU) contends that the language of Section 2000e-16(c) is itself ambiguous with regard to the filing deadline. Rather, they contend instead that this provision should be "liberally" construed in light of its remedial purpose, and that compliance with the statutory time period for filing a complaint mandated by Section 2000e-16(c) should not be deemed a "jurisdictional" prerequisite to suit, but rather should be treated like a statute of limitations subject to waiver, estoppel, and equitable tolling. Pet. Br. 5, 9-11; NTEU Br. 8-10; but see NTEU Br. 16 ("'the plain, obvious and rational meaning of a statute is always to be preferred,' even where suit is being brought against the government" (quoting *Chandler* v. *Roudebush*, 425 U.S. 840, 848 (1976)).

Petitioner and NTEU offer somewhat inconsistent arguments in support of their invitation to this Court to overlook the plain statutory language of Section 2000e-16(c). For example, NTEU suggests that the statutory limitation need not be strictly observed because the thirty-day filing requirement "is not mandatory in tone nor does it speak in jurisdictional terms." NTEU also claims that the language, structure and legislative history of the provision suggest that Congress intended the thirty-day time period to be interpreted in the same manner as the private sector limit (NTEU Br. 12-15); and that "sovereign immunity provides no support for construing the public sector provision differently from a virtually identical provision in the private-sector law." *Id.* at 15-18.

Petitioner's argument, however, proceeds on the premise that "neither the statute nor the legislative history provides much in the way of guidance." Pet. Br. 9. He argues that this asserted lack of guidance creates a "procedural ambiguity" that should be resolved in favor of the complaining party, and that the filing deadline in Section 2000e-16(c) should be treated like the filing deadline for private sector employees. Pet. Br. 10.[6] None of these arguments offers any sufficient reason for disregarding the plain language of Section 2000e-16(c) in this case.[7]

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[6] For the reasons explained above, we do not agree that there is any "lack of guidance" in the statutory language. Moreover, even if there is any ambiguity in that language, principles of sovereign immunity require that the terms of the government's consent to be sued be interpreted strictly, with ambiguities resolved in favor of the government. See, *e.g.*, *United States* v. *Testan*, 424 U.S. 392, 399 (1976).

[7] We note, however, that this Court need not reach the jurisdictional issue. While petitioner and NTEU argue vigorously that 42 U.S.C. 2000e-16(c) is not jurisdictional but is subject to waiver, estoppel and equitable tolling, neither has shown that petitioner would be entitled to equitable relief under the facts of this case, even if this Court should agree with their interpretation of the statute. First, the government filed a

1. *The Thirty-Day Filing Deadline For Federal Employee Discrimination Suits Is Not Permissive*

NTEU contends (Br. 10-11) that Section 2000e-16(c) does not impose a mandatory time limitation because it is phrased in permissive terms and refers to

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timely motion to dismiss for non-compliance with the statutory deadline (see J.A. 9-10), so the government has clearly not waived petitioner's non-compliance with the limitation period. Nor is there any basis for a claim that affirmative misconduct on the part of the defendant lulled the petitioner into inaction, see *Heckler* v. *Community Health Services*, 467 U.S. 51, 59 (1984), even assuming that such misconduct could form a basis for an estoppel against the government. See generally U.S. Br. in *Office of Personnel Management* v. *Richmond*, No. 89-1943 (argued Feb. 21, 1990). Finally, there is no basis for any claim that petitioner received inadequate notice or acted diligently, but unsuccessfully, to file a timely complaint. Petitioner and his attorney both received actual notice weeks before the thirty-day filing period expired. Petitioner's attorney should have been aware that the notice had been received by his office on March 23, and that there was at least a substantial possibility that the filing period ran from that date. Nevertheless, suit was not filed until the timeliness of the complaint was in doubt. See *Baldwin County Welcome Center* v. *Brown*, 466 U.S. at 151 ("One who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence."); *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 466 (1975) (the equities do not weigh in favor of modifying statutory requirements when the procedural default is caused by petitioner's "failure to take the minimal steps necessary" to preserve his claims).

As this Court has held, where none of petitioner's arguments requires the Court to disregard the plain language of a statutory requirement for filing suit, the Court "need not determine whether [the procedural requirement] is jurisdictional in the strict sense of the term." *Hallstrom* v. *Tillamook County*, 110 S. Ct. at 311.

the provisions applicable to private sector employees —*i.e.* it states that "[w]ithin thirty days of receipt of notice of final [agency] action * * * [an employee] *may* file a civil action as provided in section 2000e-5 of this title" (emphasis added). But it is clear that the permissive form is used simply to indicate that an aggrieved claimant, if he desires, may seek review of his discrimination claim in federal court, although he is obviously not obligated to do so. There is no suggestion that the time limitation itself is permissive. The statute cannot reasonably be read to provide that an employee may file an action within 30 days, or such longer time as he prefers.

Nor does Section 2000e-16's reference to Section 2000e-5—which contains procedures for challenging employment discrimination in the private sector—suggest that the time limit in Section 2000e-16 is permissive. Instead, by that reference, Congress simply incorporated the express procedural provisions spelled out in the former Section into the latter. See also 42 U.S.C. 2000e-16(d) ("[t]he provisions of section 2000e-5(f) through (k) of this title, as applicable, shall govern civil actions brought hereunder").[8] There is nothing in Section 2000e-5 that states that the time limits for filing civil actions against private sector employers in district courts are not jurisdictional, and they may well be.[9]

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[8] Thus, this Court held in *Chandler* v. *Roudebush*, 425 U.S. 840 (1976) that the procedural provision of a trial *de novo* in district court contained in Section 2000e-5 also applied to federal employees under Section 2000e-16.

[9] As we explain at pp. 17-19, *infra*, this Court's decision in *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385 (1982), dealt with a quite different question: whether the timely filing of the complaint *at the administrative level* is a jurisdictional prerequisite to a subsequent judicial complaint.

In any event, the reference to Section 2000e-5 in Section 2000e-16(c) should not be interpreted as indiscriminately incorporating all subsequent interpretations of the former Section into the latter, since Section 2000e-16(c) must be construed in light of well-settled principles of sovereign immunity. See *Brown* v. *GSA*, 425 U.S. 820, 833 (1976) (Title VII remedies against the government, which constitute consent to be sued, necessarily implicate issues of Governmental immunity). "In particular, '[w]hen waiver legislation contains a statute of limitations, the limitations provision constitutes a condition on the waiver of sovereign immunity.'" *United States* v. *Mottaz*, 476 U.S. at 841 (quoting *Block* v. *North Dakota*, 461 U.S. 273, 287 (1983)). Thus, because the thirty-day limitations period set forth in Section 2000e-16(c) "is a central condition of the consent given by the Act," see *Mottaz*, 476 U.S. at 843, courts may not extend that period by terming it a statute of limitations and on that basis applying equitable principles that, in the private context, might justify the waiver or tolling of statutes of limitations. See *Soriano* v. *United States*, 352 U.S. at 275 (petitioner's reliance on case holding that the existence of hostilities tolled statute of limitations was misplaced because case "involved private citizens, not the Government [and, hence,] ha[d] no applicability to claims against the sovereign").

2. The Legislative History Of The Equal Employment Opportunity Act Of 1972 Does Not Justify Ignoring The Plain Terms Of Section 2000e-16(c)

In 1972, Congress enacted the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103. In that Act, it extended the protection of Title VII to federal employees in order to provide such

employees with "the full rights available in the courts as are granted to individuals in the private sector under Title VII." S. Rep. No. 415, 92d Cong., 2d Sess. 16 (1971); accord H.R. Rep. No. 238, 92d Cong., 1st Sess. 21 (1971). Petitioner (Br. 9-10) and NTEU (Br. 12-16) contend that this purpose demonstrates that Congress intended to enact a broad waiver of sovereign immunity, and that since the filing deadline for private employees is subject to equitable tolling, the filing deadline applicable to federal employees must also be. Neither contention is correct. In *Library of Congress* v. *Shaw*, 478 U.S. 310 (1986), this Court expressly refused to interpret the 1972 Act as a broad waiver of sovereign immunity that required federal employees to be treated precisely like private employees under Title VII. Compare 478 U.S. at 319 (majority opinion, recognizing that Congress waived sovereign immunity by extending Title VII to federal employees in 1972 Act, but refusing to read that waiver broadly to include liability for interest on attorney fee awards) with *id.* at 325-326 (dissenting opinion, urging interpretation of 1972 Act as broad waiver of sovereign immunity—the precise position now urged by petitioner and NTEU).

The structure of 42 U.S.C. 2000e-16 demonstrates that although Congress intended to extend to federal employees protections against employment discrimination equivalent to those previously afforded private sector employees, it recognized the differences in the situations of the two groups by providing somewhat different procedural mechanisms for enforcing those protections. See Note, *Limitations Periods Under Title VII: Has Time Run Out On The Sovereign Immunity Doctrine?*, 63 B.U.L. Rev. 1157, 1183 (1983). For example, federal employees have the op-

tion of appealing an adverse agency action to the EEOC or proceeding directly to the district court (42 U.S.C. 2000e-16(c))—an option not available to a private sector employee, who must proceed through the EEOC or the appropriate state agency. 42 U.S.C. 2000e-5(b), (c) and (e). And, of particular significance to this case, Congress enacted a significantly shorter time period for federal employees to file complaints in district court than it did for private sector employees. Compare 42 U.S.C. 2000e-5(f)(1) (90-day period for private sector employees) with 42 U.S.C. 2000e-16(c) (30-day period for federal employees).[10] This difference in treatment with regard to the precise time limit in question conclusively refutes the claim that Congress intended to treat federal and private employees identically under Title VII.[11]

But even assuming Congress intended that federal and private sector employees should be treated alike,

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[10] Alternatively, a federal employee may file a civil suit if either the employing agency or the EEOC has not acted on his claim within 180 days after the initial charge was filed with it. 42 U.S.C. 2000e-16(c).

[11] Amicus NTEU suggests that the statutory time limit for federal employees is too short (Br. 14, noting that "30 days is a difficult deadline for even the most diligent employee to meet"). This concern is more appropriately addressed to Congress, which established the deadline, rather than this Court. Cf. *Hallstrom* v. *Tillamook County*, 110 S. Ct. at 309. Indeed, Congress is presently considering S. 2104, 101st Cong., 2d Sess. (1990), which includes a provision that would amend Section 2000e-16(c) to increase the time limit for federal employee suits to 90 days from the receipt of the right to sue notice. 136 Cong. Rec. S1020 (daily ed. Feb. 7, 1990). It is not for this Court to rewrite the statute in the guise of "accommodations * * * in construing the statutory time limit." NTEU Br. 15.

that general intent is not enough to constitute a waiver of sovereign immunity justifying equitable limitations on the express statutory preconditions to the filing of a civil action against a federal employer. This Court has specifically held that the analysis of Title VII in the context of private employment might not be applicable to the government employment context precisely because "there [are] no problems of sovereign immunity in the context of [private employment]." *Brown* v. *GSA*, 425 U.S. at 833. And, as the Court explained in *Library of Congress* v. *Shaw*, 478 U.S. at 319-320, not only Title VII but "[o]ther statutes placing the United States in the same position as a private party also have been read narrowly to preserve certain immunities that the United States has enjoyed historically." The Court cited *Lehman* v. *Nakshian*, 453 U.S. 156 (1981) (jury trials are available to private, but not to Government, employees under the Age Discrimination in Employment Act), and *Laird* v. *Nelms*, 406 U.S. 797 (1972) (although the Federal Tort Claims Act made the United States liable for the "negligent or wrongful act or omission of any employee of the Government * * * if a private person, would be liable to the claimant," 28 U.S.C. 1346(b), the United States nonetheless is not liable for the entire range of conduct classified as tortious under state law).

3. *This Court's Cases Do Not Justify Ignoring The Plain Terms Of Section 2000e-16(c)*

Petitioner (Br. 6-11) and NTEU (Br. 8-9) rely on several decisions of this Court interpreting filing requirements in cases arising in the private sector, urging that the Court's conclusion that such requirements are subject to equitable tolling should also apply to the filing requirement in Section 2000e-16 for

suits by federal employees. As we have explained, however, the doctrine of sovereign immunity precludes such an automatic application of precedent from the private sector to suits against the government. See pp. 13-14, *supra*.

In addition, it is significant that the seminal case involving Title VII time limits in the private sector, *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385 (1982), involved the interpretation of 42 U.S.C. 2000e-5(e)—the statutory time limit for filing the initial charge with the EEOC—not 42 U.S.C. 2000e-5(f)(1)—the time limit governing the subsequent judicial action.[12] The Court observed in *Zipes* that strict time limits are inappropriate "in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process." 455 U.S. at 397 (quoting *Love* v. *Pullman*, 404 U.S. 522, 527 (1972)). But the filing limit for the judicial complaint comes into play at a much later stage in the proceedings, after administrative review of the case

[12] We recognize that in *Crown, Cork & Seal Co.* v. *Parker*, 462 U.S. 345, 349 n.3 (1983), a case involving the timeliness of a Title VII complaint by a private sector employee, the Court stated that the employer's argument that the Section 2000e-5(f)(1) time limit was jurisdictional "is foreclosed by the Court's decisions in *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 398 (1982), and *Mohasco Corp.* v. *Silver*, 447 U.S. 807, 811 and n.9 (1980)." The *Mohasco* citation refers to a footnote in that case noting that the employer had not asserted a claimant's failure to file a complaint within 90 days as a defense. As the Court explained in *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. at 398, that failure would have been irrelevant if the defect were jurisdictional. Nevertheless, this Court has not expressly considered the factors that distinguish a time limit applicable to the initial filing of the charge with the EEOC from those that apply to the filing of the judicial complaint.

has been completed. It is not unreasonable to expect that the aggrieved employee will either have retained counsel by that point in the process or will promptly do so in order to pursue his judicial remedies. Moreover, because the time period is triggered by receipt of the notice of the right to sue, there is no uncertainty about the claimant's knowledge of his legal remedies, as there may be in the context of the initial filing of the complaint. Accordingly, the policy concern informing *Zipes* is inapplicable with respect to the time limits for judicial review. Cf. Note, *Equitable Tolling Of Title VII Time Limits In Actions Against The Government*, 74 Cornell L. Rev. 199, 212-215 (1988) (suggesting that time limits after first interagency filing should be jurisdictional, as at that point "concerns with coercion within the workplace should disappear").

In sum, because the statutory deadline in Section 2000e-16(c) constitutes one of the terms of the sovereign's consent to be sued and, as such, defines the district court's jurisdiction, the court below correctly concluded that the timely filing requirement in Section 2000e-16(c) is a jurisdictional prerequisite to district court consideration of a government employee's Title VII complaint. Accord *Sims* v. *Heckler*, 725 F.2d 1143, 1145-1146 (7th Cir. 1984); *Rice* v. *Hamilton Air Force Base Commissary*, 720 F.2d 1082, 1083 (9th Cir. 1983); Contra *Martinez* v. *Orr*, 738 F.2d 1107, 1110 (10th Cir. 1984); *Milam* v. *United States Postal Service*, 674 F.2d 860, 862 (11th Cir. 1982); *Saltz* v. *Lehman*, 672 F.2d 207, 208 (D.C. Cir. 1982).

II. PETITIONER RECEIVED CONSTRUCTIVE NOTICE OF THE EEOC DECISION WHEN IT WAS DELIVERED TO THE OFFICES OF HIS DESIGNATED COUNSEL

The court below correctly decided that petitioner received constructive notice of the EEOC decision when the decision was delivered to the offices of his designated counsel. As this Court has observed, we operate under a "system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.'" *Link* v. *Wabash R.R.*, 370 U.S. 626, 634 (1962) (quoting *Smith* v. *Ayer*, 101 U.S. 320, 326 (1879)).

This basic assumption underlying our legal system is reflected in Fed. R. Civ. P. 5(b), which requires that "[w]henever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party is ordered by the court." [13]

When Congress enacted Section 2000e-16(c), it was of course aware of this assumption; nevertheless, the only exception it made to the usual rules of service was a provision that the relevant time period starts with receipt, rather than mailing, of the notice. Compare Fed. R. Civ. P. 5(b) with 42 U.S.C. 2000e-16(c). No further exceptions should be added by judicial interpretation. *TVA* v. *Hill*, 437 U.S. 153, 194-196 (1978); *United States* v. *Locke*, 471

[13] Rule 5(b) further provides that service upon the attorney may be made by mailing a copy of the document to the attorney's last known address. That is precisely the course followed by the EEOC here.

U.S. at 95-96. Instead, in the absence of any indication that Congress intended to deviate from the long-standing tradition of representative litigation, the statutory language should be interpreted in light of that tradition. See *Decker* v. *Anheuser-Busch*, 632 F.2d 1221, 1224 (1980), vacated and remanded for additional factfindings, 670 F.2d 506 (5th Cir. 1982) (en banc).[14]

[14] The circuits that have addressed the issue have generally recognized that the receipt of the EEOC notice of right to sue by a claimant's attorney triggers the statutory period for filing suit. See *Jones* v. *Madison Services Corp.*, 744 F.2d 1309, 1313-1314 (7th Cir. 1984); *Harper* v. *Burgess*, 701 F.2d 29, 30 (4th Cir. 1983); *Gonzalez* v. *Stanford Applied Engineering*, 597 F.2d 1298, 1299 (9th Cir. 1979). Cf. *Rea* v. *Middendorf*, 587 F.2d 4 (6th Cir. 1978) (when claimant receives notice *before* attorney, time runs from claimant's receipt of notice).

Two circuits have held that the statutory time limit does not begin to run until the claimant himself receives notice. *Bell* v. *Brown*, 557 F.2d 849 (D.C. Cir. 1977); *Craig* v. *Department of HEW*, 581 F.2d 189, 193 (8th Cir. 1978). As the court below explained (J.A. 37-40), those cases were decided when regulatory authority under Title VII was vested in the former Civil Service Commission, whose regulations specifically stated that the employee could file a civil action "[within] thirty (30) calendar days of *his* receipt of notice of final [agency or Commission] action." 5 C.F.R. 713.281(a) and (c) (1972) (emphasis added). Since then, regulatory authority has been shifted to the EEOC, which modified this regulation by dropping the word "his" prior to the word "receipt." 29 C.F.R. 1613.281(a) and (c) (1980). As the court below observed (J.A. 40), with this change in the regulation, and "[w]ithout an authoritative administrative interpretation of the statute, much of the rationale for [those cases] disappears." We note, however, that the D.C. Circuit has subsequently followed *Bell* without further analysis in *Brown* v. *National Highway Traffic Safety Administration*, 673 F.2d 544 (1982) (interpreting time limits under 5 U.S.C. 7703), but see *Josiah-Faeduwor* v. *Communications Satellite*

Finally, the conclusion of the court below that such notice is effective from the time of its delivery to the attorney's office—without regard to when the attorney actually reads the communication—is both reasonable and fully consistent with the purposes of Title VII. See *Ringgold* v. *National Maintenance Corp.*, 796 F.2d at 770; *Decker* v. *Anheuser-Busch*, 632 F.2d at 1224. It is important that the event triggering the running of the statutory time limitation be easily and objectively determinable by both parties to the litigation. The receipt by counsel's office of a certified letter is such an event, since it is memorialized by a signed acknowledgment of receipt. See J.A. 18. In contrast, the date on which counsel first actually reads the notice is not so easily verifiable. Cf. *Reed* v. *Frank*, petition for cert. pending, No. 89-6585 (EEOC notice delivered to counsel's office on June 22, 1987, but allegedly not read by counsel until either June 23 or 24, 1987). Commencement of the statutory time period should not hinge on the internal office procedures or work habits of particular attorneys. The handling of the EEOC right to sue notice, once received at the offices of the claimant's counsel of record, is a matter between the claimant and his counsel. It should not affect the limitation on suit mandated by Congress.

In this case, the statutory time period began to run when the right to sue notice was received at the office of petitioner's attorney on March 23, 1987--not the later date when it was received by petitioner himself,

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Corp., 785 F.2d 344, 347 (D.C. Cir. 1986) (refusing to follow "bright line" test of *Bell* in private sector case, where claimant failed to receive notice because she moved without notifying EEOC of her new address). See also *Thomas* v. *KATV Channel 7*, 692 F.2d 548 (8th Cir. 1982) (following *Bell* in private sector case), cert. denied, 460 U.S. 1039 (1983).

or the still later date when petitioner's attorney actually read the notice. Since suit was not filed within 30 days of March 23, petitioner's Title VII action was jurisdictionally out of time.[15]

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[15] Petitioner asserts (Br. 11-20) that the event that triggers the running of the statutory time period is the receipt of actual notice by petitioner, and that notice to his attorney is not sufficient. Even if the time did not start to run until April 7, when petitioner allegedly received the right to sue notice, peitioner's complaint was still untimely, because he failed to name the proper defendant in his complaint and did not cure this defect through notice to the proper defendant within the pertinent time period.

Section 2000e-16(c) expressly requires that in the civil action authorized by that Section, "the head of the department, agency, or unit, as appropriate shall be the defendant." This requirement was highlighted in the notice of right to sue received by petitioner and his attorney. See note 2, *supra*. Despite this clear warning, petitioner nevertheless failed to name the Administrator of the Veterans Administration. Instead, he named in his complaint and in his amended complaint only the Veterans Administration and certain VA employees. See note 3, *supra*. This was jurisdictionally inadequate. See, *e.g.*, *Hancock* v. *Egger*, 848 F.2d 87 (6th Cir. 1988); *Honeycutt* v. *Long*, 861 F.2d 1346, 1350-1351 (5th Cir. 1988). Even amicus NTEU recognizes that naming the head of the agency is an "absolute requirement." NTEU Br. 14 n.13.

While petitioner could even today amend his complaint to add the Administrator of the VA as a named defendant, that would not cure the jurisdictional problem. Under Fed. R. Civ. P. 15(c), an amendment changing a party against whom a claim is asserted "relates back" to the date the original complaint was filed only if a plaintiff has given adequate notice to the proper defendant within the applicable time period. *Schiavone* v. *Fortune*, 477 U.S. 21, 29 (1986). Petitioner has apparently failed to satisfy that requirement. Service of the complaint was made on the named defendants on May 11 and 12, 1987. Docket Entries 2-4. Even assuming that the time did not begin to run until April 7, the VA

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted.

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thus did not receive constructive notice of the action until 34 days later. Therefore, the Administrator of the Veterans Administration received neither actual nor constructive notice of the action within the prescribed period.

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In The

Supreme Court of the United States

October Term, 1990

SHIRLEY W. IRWIN,

Petitioner,

v.

VETERAN'S ADMINISTRATION, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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I. CONGRESS INTENDED THE THIRTY-DAY PERIOD IN 42 U.S.C. § 2000e-16(c) TO BE SUBJECT TO EQUITABLE TOLLING.

A. The "Plain Language" Of § 2000e-16(c) In No Way Indicates That The Thirty-Day Period Is Non-Tollable; Instead Congress Used Language Typically Construed As Equitably Tollable.

This is not a plain language case. Nowhere in § 2000e-16(c) did Congress expressly provide that the 30-day period for filing discrimination suits against federal employers is "jurisdictional." *See* 42 U.S.C. § 2000e-16(c). Nowhere in § 2000e-16(c) or the whole of Title VII did Congress declare that meeting the thirty-day filing requirement is a "mandatory precondition" to the government's waiver of sovereign immunity. And nowhere did Congress state that the thirty-day period is "absolute" or that the filing period is "not subject to tolling in equitable circumstances." The government's "plain meaning" argument reads terms into the statute that are just not there. The only aspect of the provision that is "plain" is that the length of the period is thirty days. Yet, the central issue before the Court is not the *length* of the thirty-day period, but rather the *character* and *jurisdictional significance* of the period, which is far from "plain."

The government's assertion that this is a plain meaning case is betrayed not only by the absence of express statutory terminology, but also by the deep split in the circuits on this issue. Indeed, the vast majority of the circuits have held § 2000e-16(c) non-jurisdictional and tollable. *Johrson v. Burnley*, 887 F.2d 471, 478 (4th Cir. 1989); *Warren v. Department of the Army*, 867 F.2d 1156, 1159 (8th Cir. 1989); *Mondy v. Secretary of the Army*, 845

F.2d 1051, 1054-57 (D.C. Cir. 1988); *Hornsby v. United States Postal Serv.*, 787 F.2d 87, 89 (3rd Cir. 1986); *Martinez v. Orr*, 738 F.2d 1107, 1110 (10th Cir. 1984); *Milam v. United States Postal Serv.*, 674 F.2d 860, 862 (11th Cir. 1982). It is somewhat surprising that six federal circuits could have missed or ignored the terms that the government now claims to be so "plain." Moreover, even those circuits that have interpreted § 2000e-16(c) as jurisdictional have not based their decision on the section's plain language. *See, e.g., Cooper v. Bell*, 628 F.2d 1208, 1213, n.10 (9th Cir. 1980) (relying on the overall regulatory scheme); *Eastland v. Tennessee Valley Authority*, 553 F.2d 364, 368 (5th Cir.), *cert denied*, 434 U.S. 985 (1977) (relying on legislative history and analogous private sector cases which this Court later overruled in *Zipes* and *Crown, Cork & Seal Co.*).

There are cases where courts have regarded exceptionally emphatic language as a sign of legislative intent that a time limit should be jurisdictional. For example, in *King v. Dole*, 782 F.2d 274, 276 (D.C. Cir. 1986), *cert denied*, 479 U.S. 856 (1987), the D.C. Circuit found the time limit in 5 U.S.C. § 7703(b)(2) jurisdictional, relying on its emphatic character: "notwithstanding any other provision of law, any such case filed . . . must be filed within thirty days. . . . " That same court later noted the contrast between the emphatic language construed in *King* and the language of § 2000e-16(c): "Within thirty days of receipt of notice of final action . . . an employee . . . may file a civil action as provided in Section 2000e-5 of this title. . . . " According to the D.C. Circuit, "the words of § 2000e-16(c) certainly have no special ring." *Mondy v. Secretary of the Army*, 845 F.2d 1051, 1056 (D.C. Cir. 1988).

It is significant that the plain terms of § 2000e-16(c) are no more emphatic or mandatory than the language of other Title VII time limits that this Court has construed as equitably tollable. *See, e.g., Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982); *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983). In *Zipes*, this Court ruled that the time limit in 42 U.S.C. § 2000e-5(e) is non-jurisdictional and subject to equitable tolling. 455 U.S. at 398. The terminology in § 2000e-5(e) reads simply: "A charge under this section shall be filed within one-hundred and eighty days after the alleged unlawful employment practice. . . . " If anything, this non-jurisdictional and tollable time limit sounds *more* emphatic than § 2000e-16(c). In *Crown, Cork & Seal Co.*, this Court ruled that the time limit contained in 42 U.S.C. § 2000e-5(f)(1) is also non-jurisdictional and tollable. 462 U.S. at 349 n.9. Again, the language of § 2000e-5(f)(1) – " . . . within ninety days after the giving of such notice a civil action may be brought . . . by the person claiming to be aggrieved. . . . " – is strikingly similar to that contained in § 2000e-16(c). Certainly, § 2000e-16(c) is no more plain, emphatic, or mandatory than § 2000e-5(f)(1).

Although *Zipes* and *Crown, Cork & Seal Co.* both construed time limits for suing private employers, that fact cannot be relevant to the government's "plain language" argument. In any event, the language of § 2000e-16(c) is also analogous to a time limit for suing the federal government which this Court unanimously construed as tollable in *Bowen v. City of New York*, 476 U.S. 467 (1986). *Bowen* involved a suit by the City of New York and certain individuals against the Secretary of Health and Human Services and the Commissioner of the Social

Security Administration pursuant to 42 U.S.C. § 405(g), which provides in part: "Any individual, after any final decision of the Secretary . . . may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision. . . . " Despite the Government's reliance on sovereign immunity, this Court unanimously held that the time limit in § 405(g) was subject to equitable tolling. *Bowen*, 476 U.S. at 478-482. Because the terminology of the § 405(g) time limit for suing the federal government is virtually identical to that used by Congress in § 2000e-16(c), the Court's ruling in Bowen demonstrates at the very least that the present case is not a "plain meaning" case.

The government's reliance on *Hallstrom v. Tillamook County*, 110 S.Ct. 304 (1989), is completely misplaced. First, the sixty-day notice provision at issue in *Hallstrom* was couched in mandatory terms – "No action may be commenced . . . prior to sixty days after the plaintiff has given notice of the violation [to the E.P.A.]. . . . " – and was listed in a subsection of the Act emphatically entitled "Actions prohibited." 42 U.S.C. § 6972(b). More importantly, the Court in *Hallstrom* expressly distinguished *Zipes* on the ground that *Hallstrom*'s sixty-day *waiting* period was of a fundamentally different character than *Zipes' limitation* period, recognizing that limitation periods are "traditionally subject to equitable tolling." 110 S.Ct. at 309. This Court has described equitable tolling as a "traditional" characteristic of limitation periods even when the filing period is contained in legislation authorizing suits against the federal government. *Bowen*, 476 U.S. at 480; *Honda v. Clark*, 386 U.S. 484, 501 (1967).

In sum, if the time limit in § 2000e-16(c) has a "plain meaning," it must be the "traditional" interpretation of limitations periods – i.e., that they are subject to equitable tolling. At a minimum, since time limit terminology similar to § 2000e-16(c) has been construed as tollable in both Title VII cases against private employers – *Zipes* and *Crown, Cork & Seal Co.* – and suits brought against the federal government pursuant to non-Title VII remedial legislation – *Bowen* and *Clark* – the government's argument that § 2000e-16(c) plainly precludes equitable tolling must be rejected.

B. The Language Of The Thirty-Day Filing Period, The Structure Of Title VII, And The Remedial Policies Underlying The Expansion Of Title VII To The Public Sector Demonstrate A Congressional Intent To Create A Time Limit Subject To Equitable Tolling.

The government in this case rests its entire argument upon sovereign immunity, discarding as irrelevant any precedent involving suit against a private sector defendant. Its argument is quite simple: 1) 42 U.S.C. § 2000e-16 is a waiver of the federal government's sovereign immunity; 2) the filing period in § 2000e-16(c) is a condition of that waiver and should be strictly construed; therefore 3) the thirty-day filing period is absolute, and not subject to equitable tolling. The fallacy in the government's position is that it proves too much; according to the government's logic, *any* filing period or time limit in *any* legislation that waives sovereign immunity must, of necessity, be jurisdictional, absolute, and non-tollable.

Such a *per se* approach was expressly rejected by this Court in *Bowen*. 476 U.S. at 479. In *Bowen*, this Court accepted the proposition that 42 U.S.C. § 405(g)'s sixty-day limit for suing the government was a condition of Congress' waiver of sovereign immunity and therefore subject to strict construction. *Id*. It does not automatically follow, however, that such a filing period is absolute, rigid, and non-tollable. *Id*. Instead, the determination of whether a filing period is equitably tollable remains a question of congressional intent. *Id*. As this Court in *Bowen* stated with respect to construing time limits for suing the government, "we must be careful not to 'assume the authority to narrow the waiver that Congress intended' or construe the waiver 'unduly restrictively'." 476 U.S. at 479 (citing, respectively, *United States v. Kubrick*, 444 U.S. 111, 118 (1979) and *Block v. North Dakota*, 461 U.S. 273, 287 (1983)). Essentially, the message of *Bowen* is that superficial labels – such as "jurisdictional" or "condition of the government's waiver of sovereign immunity" – do not *per se* resolve the issue of whether a time limitation is absolute or instead subject to equitable tolling. Rather, regardless of whether sovereign immunity is at issue, *Bowen* emphasizes that the issue ultimately turns on whether the doctrine of equitable tolling is consistent with Congress' intent in enacting a particular statutory scheme. 476 U.S. at 479-80. In fact, *Bowen* indicates that a "traditional equitable tolling principle" should be applied if it is "consistent with the overall Congressional purpose" and is "nowhere eschewed by Congress." 476 U.S. at 480 (citing *Honda v. Clark*, 386 U.S. at 501).

In the present case, construing the thirty-day period of § 2000e-16(c) as equitably tollable would be consistent

with congressional intent as evidenced not only by the language and location of subsection 16(c), but also by express Title VII policies, and settled Supreme Court precedent.

1. The Language And Location Of § 2000e-16(c) Reflect A Congressional Intent To Allow Equitable Tolling.

As previously shown in Part IA of this reply, the language of § 2000e-16(c) noticeably lacks emphatic, mandatory terminology. That fact not only undercuts the government's plain meaning argument, it also sheds light on Congress' intent in drafting the provision. The D.C. Circuit found it persuasive that § 2000e-16(c) has "no special ring" and interpreted that as a sign of legislative intent that the thirty-day period should be tollable. *Mondy v. Secretary of the Army*, 845 F.2d 1051, 1055-56 (D.C. Cir. 1988). Congress' use of ordinary, non-emphatic language takes on even greater significance considering this Court's recognition that time limits, such as the one in § 2000e-16(c), are traditionally subject to equitable tolling. *Hallstrom v. Tillamook County*, 110 S.Ct. 304, 309 (1989). This Court has observed this "tradition" even when construing time limits contained in legislation authorizing suit against the federal government. *Bowen v. City of New York*, 476 U.S. 467, 480 (1986); *Honda v. Clark*, 386 U.S. 484, 501 (1967). Congress can certainly be charged with awareness of this "tradition" when it enacted § 2000e-16(c) and chose such ordinary language in drafting the time limit.[1]

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[1] Moreover, this Court has construed time limits strikingly similar to the one in § 2000e-16(c) to be subject to equitable

(Continued on following page)

Furthermore, this Court in *Zipes* found both the structure of Title VII and the location of a time limit within that structure critical in deciding whether equitable tolling could be applied. 455 U.S. 385, 393-394. Thus, in finding the time limit in § 2000e-5(e) non-jurisdictional and tollable, this Court explained that the provision which specifically conferred jurisdiction on the district courts – § 2000e-5(f)(3) – contained no reference to the timely filing requirement. *Id.* Moreover, *Zipes* emphasized that the time limit construed therein appeared as an entirely separate provision which did not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts. *Id.* at 394. *Zipes'* rationale is clearly applicable to the time limit in § 2000e-16(c). The thirty-day period of § 2000e-16(c) is in a provision separate from the sections governing jurisdiction. *See* 42 U.S.C. §§ 2000e-16 and 2000e-5. Moreover, as noted by the D.C. Circuit in *Mondy*, the cross-reference from § 2000e-16(d) to § 2000e-5(f)-(k) suggests a parallelism between § 2000e-16(c) and § 2000e-5(e), the time limit interpreted as non-jurisdictional and tollable in *Zipes*. *Mondy*, 845 F.2d 1051, 1056 (D.C. Cir. 1988).

(Continued from previous page)

tolling, not only in Title VII suits against private sector employers – *Zipes v. T.W.A.*, 455 U.S. 385 (1982); *Crown, Cork & Seal, Co. v. Parker*, 462 U.S. 345 (1983) – but also in suits brought against the federal government pursuant to other sovereign-immunity-waiving remedial legislation. *Bowen*, 476 U.S. 467; *Honda*, 386 U.S. 484. The specific similarities between § 2000e-16(c) and the provisions involved in *Zipes, Crown, Cork and Seal Co., Bowen*, and *Honda* was addressed in Part IA of this brief and need not be reiterated here.

In sum, Congress' use of non-emphatic language in § 2000e-16(c), the "traditionally" tollable nature of time limits for filing suit, the location of § 2000e-16(c) within the structure of Title VII, and the implied parallelism between § 2000e-16(c) and § 2000e-5(e) sufficiently demonstrate Congress' intent to create a non-jurisdictional, non-absolute, tollable time limit in § 2000e-16(c).

2. A Holding That § 2000e-16(c) Is Tollable Is Most Consistent With Congress' Purposes In Expanding Title VII To Eliminate Discrimination In The Federal Workplace.

As this Court recognized in *Bowen*, legislation that waives sovereign immunity should not be read so narrowly as to defeat Congress' intent in enacting a particular statutory scheme. 476 U.S. 467, 479-80 (1986). The particular statutory scheme in this case is Title VII, remedial legislation that should be liberally construed in favor of parties alleging discriminatory employment practices. *Martinez v. Orr*, 738 F.2d 1107, 1110 (10th Cir. 1984); *Craig v. Department of HEW*, 581 F.2d 189, 192 (8th Cir. 1978); *Bell v. Brown*, 557 F.2d 849, 853 (D.C. Cir. 1977).

Liberally construing Title VII not only benefits individual complainants, it also promotes the national commitment to eliminate discrimination. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 45 (1974); *Martinez*, 738 F.2d at 1110; H.R.Rep. No. 238, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Admin. News 2137, 2157-2159. The legislative history of § 2000e-16 indicates that Congress considered the Federal service to be "an area where equal employment opportunity is of paramount significance." *Id.* at 2157. Recognizing "entrenched

discrimination in the Federal Service," *id.* at 2159, and desiring to completely eradicate such discrimination, the legislative history demands a "vigorous effort to accord Federal employees the same rights and impartial treatment which the law seeks to afford employees in the private sector." *Id.* at 2158.

Such noble motives and high goals are hardly indicative of a grudging waiver of sovereign immunity such that every statutory provision should be strictly construed against those whom the Act was designed to protect. Rather, the historic expansion of Title VII to eradicate discrimination in federal employment – and, specifically, Congress' expressed desire to give federal employees the same rights and remedies as private sector employees – is consistent with a broad waiver of sovereign immunity in order to promote a strong national policy of non-discriminatory practices. Thus, the provisions of § 2000e-16, including the time limit in 16(c), should be construed in the context of a broad waiver of sovereign immunity not a begrudging one. Viewed in this light, it would be anomalous for Congress to erect technical, absolute procedural barriers to be harshly applied regardless of the equities, thereby impeding the very policies that the legislation seeks to promote.

One need look no further than several circuit court cases to see how a rigid, hypertechnical reading of the relatively short thirty-day fuse, irrespective of equities, could undercut Congress' express purposes in waiving the government's sovereign immunity from Title VII plaintiffs. In various cases, Title VII plaintiffs have failed to meet the thirty-day filing requirement because: 1) the thirtieth day fell on a Sunday, thereby preventing the

filing until Monday, the thirty-first day (*Milam v. United States Postal Serv.*, 674 F.2d 860 (11th Cir. 1982)); 2) the plaintiff sued the wrong defendant – the Department instead of the head of the Department – a mistake attributed to ambiguities in the right-to-sue notice (*Warren v. Department of the Army*, 867 F.2d 1156 (8th Cir. 1989)); 3) the plaintiff, because of misleading information in the right-to-sue notice, asked the E.E.O.C. for reconsideration instead of filing suit (*Martinez v. Orr*, 738 F.2d 1107 (10th Cir. 1984)); and here 4) the plaintiff's attorney was in Korea, on active reserve duty, for most of the thirty-day period, unaware that the clock was running. It is difficult to see how barring suit in these cases, irrespective of the equities, could in any way serve Congress' demand for a vigorous effort to completely eradicate discrimination from Federal employment. One need not have an active imagination to conceive of other inequities that would undercut the policies of Title VII. Of course, under the Government's "absolutist" view, no inequity would be great enough to justify tolling the short fuse.

In an analogous case involving a suit against the federal government pursuant to remedial legislation, where the claimant technically violated a sixty-day limitations period, this Court recognized that a short time fuse on filing suit under remedial legislation is designed not primarily as a shield for the government, but to aid claimants by expediting a final resolution. *Honda v. Clark*, 386 U.S. 484, 495-496 (1967). Thus, the Court in *Clark* ruled that the sixty-day limitation period was subject to equitable tolling, finding that such a result was most consistent with the remedial legislative purpose of the Act. *Id.* at 494-495. The broad remedial purpose of the

1972 Amendments to Title VII suggests a similar interpretation of the extremely short time period in § 2000e-16(c) – i.e., that it was not intended to provide an impenetrable shield for the government, but rather to promote a quick resolution of the status of federal employees, *see Hornsby v. United States Postal Serv.*, 787 F.2d 87, 90 (3rd Cir. 1986), and to provide a quick implementation of corrective action where discrimination is ultimately proved. Such a reading of the thirty-day filing period is far more consistent with Congress' desire to eradicate discrimination in the public sector than is a rigid, inflexible reading of the filing period.

The legislative history of § 2000e-16(c) also supports a "pro-plaintiff" reading of the thirty-day period. When Congress passed the Equal Employment Opportunity Act of 1972, which extended Title VII remedies to public sector employees, it also expanded the time limit in § 2000e-5(e) – the time limit governing E.E.O.C. filings by private sector employees, which this Court held equitably tollable in *Zipes*. In the final Conference Committee analysis of the "new" time limit in § 2000e-5(e), the Committee explained:

> Court decisions under the present law have shown an inclination to interpret this time limitation so as to give the aggrieved person the maximum benefit of the law; it is not intended that such court decisions should be in any way circumscribed by the extension of the time limitations in this subsection.

118 Cong. Rec. 7166, 7167 (1972).

This congressional awareness of how courts were liberally construing Title VII time limits is instructive as

to Congress' intent in contemporaneously passing a similarly worded time limit in § 2000e-16(c). If Congress had intended the public sector time limit to be narrowly construed in favor of the government – exactly opposite to what Congress recognized was occurring with respect to similar private sector time limits – it is reasonable to expect that they would have chosen a means to do so other than congressional silence.

In sum, this Court's rationale in *Bowen* and *Honda* is fully applicable to this case: application of a traditional equitable tolling principle to the thirty-day requirement of § 2000e-16(c) is fully consistent with the overall congressional purpose in extending Title VII protections to public sector employees, and is nowhere eschewed by Congress.

II. THE THIRTY-DAY PERIOD IN 42 U.S.C. § 2000e-16(c) COMMENCES RUNNING ON THE DATE THE CLAIMANT OR HIS ATTORNEY ACTUALLY RECEIVES THE RIGHT-TO-SUE LETTER.

A. Section 2000e-16(c)'s "Receipt Of Notice" Provision Contemplates Actual Notice To The Claimant.

Although requiring "receipt of notice," the statutory language of 42 U.S.C. § 2000e-16(c) is silent as to whether "receipt" contemplates actual receipt or constructive receipt for purposes of triggering the thirty-day filing period. Where statutory language is ambiguous, courts traditionally have resolved ambiguities in remedial statutes in favor of those whom the legislation was meant to protect. *See Bell v. Brown*, 557 F.2d 849, 853 (D.C. Cir.

1977). Longstanding jurisprudence in this Court has recognized that Title VII is remedial in character and should be liberally construed to promote its purposes. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 45 (1974). Liberal reading of Title VII reflects not only the manifest importance of Title VII rights to complaining parties, but also the national commitment to eliminating such discrimination. *Alexander*, 415 U.S. at 45. Indeed, the legislative history of § 2000e-16(c) reveals that Congress' broad commitment to equal employment opportunity is of paramount significance in the federal service area:

> Americans . . . traditionally measure the quality of their democracy by the opportunity they have to participate in governmental processes. It is therefore imperative that equal opportunity be the touchstone of the federal system.

H.R. Rep. No. 238, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Admin. News 2137, 2157-58 (1972).

This strong commitment to eliminating discrimination in the federal workplace belies a congressional intention to provide federal employees a judicial remedy that can be forfeited even before an aggrieved employee knows it can be exercised. The better view – and the one in harmony with Title VII's remedial purpose – is that the time provision of § 2000e-16(c) begins running from the date the claimant actually receives the right-to-sue letter. *Craig v. Department of Health, Educ. and Welfare*, 581 F.2d 189 (8th Cir. 1978); *Rea v. Middendorf*, 587 F.2d 4 (6th Cir. 1978); *Bell v. Brown*, 557 F.2d 849 (D.C. Cir. 1977). The issue in this case does not involve merely service of process, or receipt of an offer or acceptance to make a

contract, but rather the interpretation of remedial civil rights legislation. As the D.C. Circuit emphasized, the remedial purpose of Title VII would be poorly served by application of a "constructive receipt" doctrine to the notification procedure of § 2000e-16(c). *Bell v. Brown*, 557 F.2d 849, 856 (D.C. Cir. 1977). This is especially true in view of the short thirty-day time limitation on filing suit. Emphasizing the relatively short amount of time that a claimant has to file suit under § 2000e-16(c), the D.C. Circuit in *Bell* commented that "there would surely be another unintended booby trap if the doctrine of imputed notice were allowed to displace the statutory assumption that the employee will be given notice both personally and actually." 557 F.2d at 957. In other words, allowing constructive notice to trigger such a short time period seems contrary to Congress' overall statutory desire to eradicate discrimination in the federal workplace.

The purpose of the statutory notification is to advise the claimant that his administrative remedies have been exhausted and to inform him that the thirty-day period for filing suit has begun to run. *Coles v. Penny*, 531 F.2d 609, 615 n.15 (D.C. Cir. 1976). That goal obviously has not been accomplished until the claimant is *actually* aware of the suit letter. Moreover, in terms of the policy behind limitations periods generally, the claimant can hardly be deemed to have slept on his rights if, while eagerly awaiting notice that his administrative remedies have been exhausted, the thirty-day period in which to file suit passes without his knowledge.

The government's reliance on *Link v. Wabash R.R.*, 370 U.S. 626, 634 (1962), is misplaced. *Link* merely decided that a federal trial court had the inherent authority to

dismiss a case for failure to prosecute when the plaintiff's lawyer intentionally, and without reasonable excuse, failed to appear at the scheduled pretrial conference. *Id.* at 627-634. Not surprisingly, the Court rejected the argument that a dismissal caused by unexcused attorney conduct imposes an unjust penalty on the client, ruling that a client may be bound by acts of his lawyer-agent. *Id.*, at 633-34. *Link* in no way involved the interpretation of a statute, much less specific statutory language in remedial civil rights legislation. Thus, the government's analogy to *Link* and the concept of "representative litigation" (Res. Br. at 21) fatally neglects the critical question whether, in requiring "receipt of notice," Congress intended the thirty-day clock to commence upon actual receipt of notice by a claimant, which furthers Title VII's remedial purposes, or upon constructive receipt by the claimant's representative, which might unfairly frustrate those purposes.

Moreover, Title VII bottoms its procedural mechanisms on the assumption that often there will be no lawyer to represent the aggrieved employee. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 387 (1982); *Love v. Pullman Co.*, 404 U.S. 522, 527 (1972). This is likely to be true at the time when claimants receive their right-to-sue notice from the E.E.O.C. Title VII's contemplation of litigation conducted by laymen demonstrates that when Congress used the phrase "receipt of notice" in § 2000e-16(c), it intended the claimant to receive actual notice.

The government also argues (Resp. Br. at 20) that this Court should construe § 2000e-16(c)'s thirty-day filing period in light of Fed. R. Civ. P. 5(b), which provides that

"[w]henever *under these rules* service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party is ordered by the court." (emphasis added). Rule 5(b), however, has nothing whatsoever to do with this Court's interpretation of § 2000e-16(c). First, the Rule itself expressly states that it only applies where service is required or permitted under other Federal Rules of Civil Procedure. Because Congress was aware of Rule 5(b) when it enacted § 2000e-16(c), it is reasonable to assume that Congress believed the rule meant what it says – i.e., that it applies when service is required under the Federal Rules of Civil Procedure, not anytime service or notice is required in any legislation. Moreover, Rule 5(b) provides that service upon an attorney may be made by mailing the service to the attorney's last known address. Congress, however, expressly provided in § 2000e-16(c) that the thirty-day filing period begins from the date of "receipt of notice" rather than "mailing of notice." The distinction is important, for § 2000e-16(c) demonstrates by its own language that it is not subject to the standards of Federal Rule 5(b). Indeed, nowhere in the whole statutory scheme of Title VII did Congress ever expressly or impliedly indicate that notice provisions could be satisfied merely by complying with the Federal Rules of Civil Procedure.

The government's contention that constructive receipt should be applied because it is "easily and objectively determinable" is irrelevant. The only relevant inquiry is what did Congress intend when it enacted § 2000e-16(c). A standard that is easily applied yet frustrates Congress' broad purposes in passing remedial

legislation hardly has much to commend it. A "date of mailing" standard would be very easy to apply but Congress clearly did not adopt it, suggesting that ease of application was not of paramount importance.

B. § 2000e-16(c) Contemplates At Least Actual Notice To The Claimant's Attorney.

Even if this Court's reasoning in *Link v. Wabash R.R.* is applied to § 2000e-16(c)'s notice requirement, Petitioner's attorney did not receive actual notice of the right-to-sue letter until April 10, 1987, and filed this suit in federal district court within thirty days of such receipt. The government, however, proposes that *Link* should be further extended to impute notice to the client from the date that the right-to-sue letter was *delivered* to the attorney's office. While *Link* held that the conduct of an attorney could be imputed to his client in certain circumstances, it plainly did not hold that the conduct of every non-attorney employee could be imputed to the client. *See* 370 U.S. at 634. A client obviously does not make every employee of an attorney his "agent" for purposes of Title VII litigation. The government's position is essentially this: neither the Title VII claimant *nor* his attorney needs actual notice of the right-to-sue before the short thirty-day filing period commences. Notice is imputed from the attorney's employee to the attorney; then, the *constructive notice* of the attorney is imputed to the attorney's client. And despite the remedial purpose of Title VII, the government apparently discerns nothing anomalous about concluding that constructive notice upon constructive notice is "both reasonable and fully consistent with the purpose of Title VII." (Res. Br. at 22). In short,

rather than interpret the language of § 2000e-16(c) in light of *Link*'s theory of "representative litigation," the government urges an interpretation of § 2000e-16(c) in light of its own theory of "representative representative litigation."

The government completely ignores the practical result of its argument. Receipt of a right-to-sue letter by a non-attorney employee – perhaps unfamiliar with the client's case or one who would not even read the letter – leads to an overwhelming risk that a claimant could remain in ignorance of his rights until the time to sue has passed. That danger is reduced significantly, however, if the claimant's attorney has *actual* rather than mere *constructive* notice of the right-to-sue letter. At a minimum, therefore, Congress must have intended that the thirty-day period of limitations set forth in § 2000e-16(c) does not begin to run until the right-to-sue letter is *actually* received by the attorney representing the claimant in the Title VII action.[2]

---

[2] The government claims that even if the filing period did not commence running until April 7, when the Petitioner actually received the suit letter, Petitioner's complaint was still untimely because he failed to name the proper defendant in his complaint. (Resp. Br. at 23 n.15). The government's argument improperly assumes that an amendment to Petitioner's complaint to name the proper party would not relate back to the time suit was originally filed.

There seems little doubt that this Court's requirements with respect to relation back in *Schiavone v. Fortune*, 477 U.S. 21, 29 (1986) were fulfilled before the expiration of the thirty-day limitations period. The E.E.O.C. is statutorily required to serve notice of the charge on the employer within ten days of E.E.O.C. filing by the employee. 42 U.S.C. § 2000e-5(e) (1982). Thus, unlike the litigant in an ordinary private action who may

(Continued on following page)

CONCLUSION

For the foregoing reasons, the rulings below should be reversed and this matter remanded to the United States District Court, Western District of Texas, Waco Division, for trial.

Respectfully submitted,

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(Continued from previous page)

first learn of the cause against him upon service of the complaint, the Title VII defendant is alerted to the possibility of a discrimination suit when the charge has been filed with the E.E.O.C. This notice would have provided sufficient warning to the Administration such that it would not be prejudiced in maintaining its defense. Moreover, given the substantial identity of interest existing between the Veteran's Administration and its Administrator, notice of Irwin's suit may be properly imputed to the Administrator. *See Warren v. Department of the Army*, 867 F.2d 1156, 1161 (8th Cir. 1989).

In any event, this Court did not grant certiorari on this issue, and a proper resolution of whether *Schiavone* allows relation back would necessitate a fact-finding hearing on the issue of whether the Administrator had notice of Irwin's suit within the limitations period.

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No. 89-5867

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

SHIRLEY W. IRWIN,

Petitioner,

v.

VETERANS ADMINISTRATION, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR AMICUS CURIAE NATIONAL TREASURY EMPLOYEES UNION IN SUPPORT OF PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-5867

SHIRLEY W. IRWIN,

Petitioner,

v.

VETERANS ADMINISTRATION, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR AMICUS CURIAE NATIONAL TREASURY EMPLOYEES UNION IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS CURIAE [1]

Amicus curiae, the National Treasury Employees Union ("NTEU"), is a federal-sector labor union that is the exclusive bargaining representative of approximately 140,000 federal employees nationwide. NTEU represents the interests of its bargaining units, by, among other things, negotiating collective bargaining agreements, arbitrating grievances, and seeking to vindicate the individual and collective rights of federal employees before administrative and judicial tribunals. NTEU and

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[1] Pursuant to Rule 37.3 of the Rules of this Court, all parties have consented to the filing of this brief. Their letters of consent have been lodged with the Clerk.

the employees it represents have a vital interest in the resolution of the question here, regarding whether the 30-day time period for bringing suit against the federal government under Title VII of the Civil Rights Act of 1964, as amended, is subject to equitable tolling and waiver.

The lower court has ruled that the time limit is jurisdictional and may never be modified on equitable grounds. Based on its knowledge of the realities of the EEO process in the public sector, NTEU believes that this ruling would impose serious obstacles to fulfillment of Congress' commitment to eradicate entrenched discrimination in the federal workplace. The lower court's holding frustrates this congressional goal because, as in the private sector, many federal employee complainants pursue their claims without any representation at all, or at best, with the advice of non-lawyer union representatives. Complainants' rights are further at risk because the federal EEO process is especially complex, and the time period for bringing suit once administrative remedies have been exhausted is quite short. Because of its commitment to promoting a federal workplace free of unlawful discrimination, and its interest in protecting the civil rights of its members, NTEU is filing this brief in support of petitioner.[2]

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[2] As amicus curiae, we address in detail only the first question presented in the petition for a writ of certiorari, *i.e.*, the critical legal issue concerning whether the 30-day time limit for filing civil suits is jurisdictional or is subject to waiver and tolling. This case also raises the subsidiary question of whether the 30-day period begins to run when the claimant or his attorney receives actual notice of final agency action, or, as the lower court held, when the notice is received by the attorney's office. Even if the filing period commences when notice is received in an attorney's office, equitable principles require that tolling be available to ensure that the notice is reasonable and that the complainant is given a fair opportunity to meet the 30-day deadline. This fact-bound question is best left to the trial court.

STATUTORY BACKGROUND

Congress extended the protections of Title VII of the Civil Rights Act of 1964, as amended, to federal employees in § 11 of the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103. As amended, section 717(a) of Title VII, 42 U.S.C. § 2000e-16(a), prohibits federal agencies from discriminating against employees on the basis of race, color, religion, sex, or national origin. Title VII's "remedies, procedures and rights" (contained in 42 U.S.C. § 2000e-16) were made applicable to federal employees' claims of handicap discrimination, by the 1978 amendments to the Rehabilitation Act. 29 U.S.C. § 794a(a)(1). Petitioner's claim of handicap discrimination, therefore, is subject to the same 30-day filing period and other procedures as discrimination claims brought under Title VII (42 U.S.C. § 2000e-16(c)).[3]

Under Title VII, federal employees, like employees in the private sector, are guaranteed the right to a trial *de novo* in a federal district court, once informal conciliation efforts have failed. *Chandler v. Roudebush*, 425 U.S. 840 (1976). In the federal sector, however, there is a bewildering array of alternative administrative routes federal employees may follow before they may file a Title VII civil action in district court. Congress treated discrimination in the federal workplace so seriously that it gave employees several alternative methods for seeking redress before finally reaching federal court. The Joint Explanatory Statement of the Committee on Conference of the Civil Service Reform Act of 1978 lists "eight different times when the employee may have the right to bring suit in Federal district court." H.R. CONF. REP.

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[3] Whether Title VII's 30-day time period applies to petitioner's claim of age discrimination is in doubt. *Compare Bornholdt v. Brady*, 869 F.2d 57, 64-68 (2d Cir. 1989) and *Lubniewski v. Lehman*, 891 F.2d 216, 218-19 (9th Cir. 1989) *with Lavery v. Marsh*, 727 F. Supp. 728 (D. Mass. 1989).

No. 1717, 95th Cong., 2d Sess. 141, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 2860, 2875. Each of these paths has its own pitfalls, against which the administrative agencies have tried to protect employees by routinely making filing dates subject to equitable tolling.

The various paths appear within two basic administrative routes a federal discrimination complainant may follow on the way to district court. The ruling here, regarding construction of the judicial filing period, will directly control all future access to the courts under the first route. It may also affect judicial access at various junctures under the alternative route.

1. The federal complainant's first option, used by petitioner here, is to follow administrative procedures prescribed by the Equal Employment Opportunity Commission ("EEOC") pursuant to 42 U.S.C. § 2000e-16(b). This course begins with informal counselling and a formal complaint and culminates in a final written decision by the agency head. There are time limits at each step in the process, including time limits for contacting an EEO counsellor and filing an administrative complaint, but these periods are subject to equitable tolling. *See* 29 C.F.R. §§ 1613.214(a)(1)(i), (a)(1)(ii), (a)(4); 1613.215(a)(4).

After obtaining a final agency determination, the employee has two choices. He "may file a civil action as provided in section 2000e-5 of [Title 42]" (the private sector analogue of section 717) within 30 days of receipt of the agency's final decision. 42 U.S.C. § 2000e-16(c); *see* 29 C.F.R. § 1613.281(a).[4] Alternatively, an employee may file a notice of appeal with the EEOC, within 20 days of receipt of the agency's decision, a filing period that is subject to tolling. 29 C.F.R. § 1613.233(a), (c).

[4] The employee may file a civil action without waiting for a final agency decision if none has been issued after 180 days from the date the complaint was filed. 29 C.F.R. § 1613.281(b).

The employee then has the right to file a civil action under 42 U.S.C. § 2000e-16(c) within 30 days of receipt of the EEOC's decision—which is the provision at issue in this case—or after 180 days from the filing of the notice of appeal, if there has been no decision. 29 C.F.R. § 1613.281(c), (d).

2. In addition to these avenues of redress specifically provided by section 717(c) of Title VII, the Civil Service Reform Act of 1978, Pub. L. No. 95-454 ("CSRA"), provides its own complex assortment of procedures for federal employees suffering unlawful discrimination.

If the discrimination is the basis for an adverse personnel action that is otherwise directly appealable to the Merit Systems Protection Board ("MSPB" or "Board") (generally serious discipline or performance based actions), the employee may pursue his Title VII claims before the Board. 5 U.S.C. § 7702. After the MSPB decides the case, the employee has three options.[5] First, the employee can file an appeal directly in the Court of Appeals for the Federal Circuit under 5 U.S.C. § 7703(b)(1), "within thirty days after the date the petitioner received notice" of the final Board order, but only if he waives all discrimination components of his claim.[6] Second, if he wishes to preserve his Title VII claim, the employee can file an action in district court under section 717(c) of the Civil Rights Act of 1964. 5 U.S.C. § 7703(b)(2). The Civil Service Reform Act provides, however, that "[n]otwithstanding any other

[5] If the Board does not act within 120 days (5 U.S.C. § 7702(a)(1)), the employee "shall be entitled to file a civil action to the same extent and in the same manner as provided in section 717(c) of the Civil Rights Act of 1964." 5 U.S.C. § 7702(e)(1)(B).

[6] The Federal Circuit has held that it does not have appellate jurisdiction over adverse personnel actions in "mixed" cases—that is, cases where a discrimination claim is part of the employee's challenge. *Williams v. Department of the Navy*, 715 F.2d 1485, 1488 (Fed. Cir. 1983). The employee must waive the discrimination claims before the court of appeals will assume jurisdiction.

provision of law, any such case . . . must be filed within 30 days after the date the individual filing the case received notice of the judicially reviewable action under section 7702." *Id.* Alternatively, "within 30 days after notice" of the MSPB's decision, an employee can petition the EEOC to consider it, 5 U.S.C. § 7702(b)(1), setting in motion an extremely complicated scheme of review.

Under this scheme, the EEOC must decide within 30 days whether to consider the MSPB's decision; if it does not, that decision becomes "judicially reviewable" as of the date the EEOC declines consideration. 5 U.S.C. § 7702(b)(2), (a)(3)(B). If the EEOC decides to consider the MSPB decision, it must, within 60 days, either concur in the Board's decision or issue a decision of its own. 5 U.S.C. § 7702(b)(3). If it concurs, "the decision of the Board shall be a judicially reviewable action." 5 U.S.C. § 7702(b)(5)(A). If the EEOC issues its own decision, the MSPB must consider the EEOC decision within 30 days. 5 U.S.C. § 7702(c). If the Board concurs, its decision becomes judicially reviewable, but if the Board disagrees, the entire matter must be certified to a Special Panel. 5 U.S.C. § 7702(c), (d)(1). The Panel issues a "judicially reviewable" decision within 45 days. 5 U.S.C. § 7702(d)(2)(A). At any time after 180 days from the time the employee first petitioned the EEOC for review, the employee "is entitled to file a civil action to the same extent and in the same manner as provided in section 717(c) of the Civil Rights Act of 1964." 5 U.S.C. § 7702(e)(1)(C).

Finally, employees who are covered by a collective bargaining agreement may elect to pursue yet another avenue of review—grievance arbitration. 5 U.S.C. § 7121(d). An employee who elects grievance arbitration may file a petition for review with the MSPB "within 20 days after receipt of the final decision," if the discrimination occurred in connection with a personnel action over which the Board has jurisdiction. 5 C.F.R. § 1201.154(b). Alternatively, under EEOC regulations, an employee who elects contractual remedies may file a notice of appeal to the EEOC up to 20 days after 1) receipt of a final agency decision on the grievance and the expiration of the time during which arbitration may be invoked; 2) receipt of the arbitrator's award; or 3) receipt of a decision of the Federal Labor Relations Authority on exceptions to the arbitrator's award. 29 C.F.R. § 1613.233(b). This 20-day deadline is subject to tolling. 29 C.F.R. § 1613.233(c). When an employee has pursued a negotiated procedure and sought review by the EEOC or MSPB, he has the right to file a civil action, under the same conditions described above, relating to court access after an EEOC or MSPB decision.[7]

SUMMARY OF ARGUMENT

The time limit for filing a Title VII suit in the public sector uses the same operative language and precisely parallels the private-sector's time limit. This Court has already determined that the deadline for private workers is not jurisdictional but rather is in the nature of a statute of limitations, and thus subject to waiver and equitable tolling.

The language, statutory structure and policy behind the federal provision all establish that Congress intended the public-sector time limit to be interpreted in the same manner as its private counterpart. Congress used virtually identical permissive language and created a parallel structure, keeping the time limit separate from the courts' jurisdictional provision, and it even incorporated applicable private-sector filing provisions. The legisla-

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[7] An employee also appears to have the right to file a civil action after he has exhausted the negotiated procedure without resort to either EEOC or MSPB directly under 42 U.S.C. § 2000e-16(c), since the final decision on his grievance might be considered the agency's "final action" within the meaning of that section.

tive history is unusually clear in establishing congressional intent to place federal workers on a par with other employees and to afford them equal Title VII rights, including the same access to the courts.

Departing from the construction adopted in the private sector would severely undermine Congress' intent to eradicate discrimination in the federal workplace by imposing a substantial obstacle in the path to the district court. Such a result is particularly burdensome where, as here, it is common for employees to tread a tortuous administrative path and reach the point of judicial filing without having secured legal counsel.

Principles of sovereign immunity fail to justify a statutory interpretation that has already been rejected as too restrictive and contrary to congressional intent in the private sector. There is every indication that Congress intended to place federal workers on the same footing as private sector workers, who do not face a jurisdictional filing deadline. The courts are not free to narrow the broad waiver of sovereign immunity that Congress demonstrably provided.

ARGUMENT

This Court's decisions establish that the Title VII time limit governing the filing of civil suits in the private sector (42 U.S.C. § 2000e-5(f)(1)) is not jurisdictional but is subject to waiver, estoppel, and equitable tolling. *See Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 151-52 & n.6 (1984); *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 349-54 (1983); *Mohasco v. Silver*, 447 U.S. 807, 811 (1980).

In *Crown, Cork & Seal*, the Court ruled that the 90-day filing period was in the nature of a statute of limitations and thus subject to equitable tolling. Specifically, the period for filing an individual district court action was tolled while a class action, in which the employee

was a putative class member, was pending before the courts. 466 U.S. at 352-54. In *Baldwin County Welcome Center*, the Court assumed without debate that the same 90-day filing period was subject to waiver or tolling, in ruling that no facts justified equitable relief in that particular case. 466 U.S. at 151-52 & n.6. Finally, the Court noted in *Mohasco* that defendant had waived any objection to the suit having been filed on the 91st day, a waiver that would have been of no effect if the defect had been jurisdictional in nature. *See* 447 U.S. at 811 n.9.

Similarly, the Court has held that the period for filing an administrative charge with the EEOC is not a jurisdictional prerequisite for filing a civil suit, but is subject to waiver, estoppel and equitable tolling. *Zipes v. Trans World Airlines*, 455 U.S. 385, 393 (1982).[8] Such a holding "honor[ed] the remedial purpose of the legislation as a whole without negating the particular purpose of the filing requirement, to give prompt notice to the employer." *Zipes*, 455 U.S. at 398.

The same results should obtain in the federal sector. This Court has already recognized the general applicability of private-sector Title VII principles to the federal sector, in *Chandler v. Roudebush*. In that case, federal employees were granted the same right to trial *de novo* as is enjoyed by private sector employees under Title VII. The Court observed that "[a] principal goal" of extending Title VII to the federal employer "was to

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[8] The courts of appeals have unanimously concluded that *Crown, Cork & Seal, Baldwin County Welcome Center, Mohasco* and *Zipes* establish a general rule that the time period for filing civil actions against private employers is not jurisdictional but is in the nature of a statute of limitations subject to tolling and waiver. *Valenzuela v. Kraft, Inc.*, 801 F.2d 1170, 1174 (9th Cir. 1986); *Brown v. J.I. Case Co.*, 756 F.2d 48, 49-50 (7th Cir. 1985); *Espinoza v. Mo. Pac. R.R.*, 754 F.2d 1247, 1250-51 (5th Cir. 1985); *Rice v. New England College*, 676 F.2d 9, 10 (1st Cir. 1982); *Fox v. Eaton Corp.*, 615 F.2d 716, 718 (6th Cir. 1980).

eradicate 'entrenched discrimination in the Federal service' . . . by strengthening internal safeguards and by according '[a]ggrieved [federal] employees or applicants . . . *the full rights available in the courts as are granted to individuals in the private sector under title VII.*'" *Chandler v. Roudebush*, 425 U.S. at 841, *quoting Morton v. Mancari*, 417 U.S. 535, 547 (1974) and S. Rep. No. 415, 92d Cong., 2d Sess. 16 (1971) (emphasis supplied). The principles of waiver and equitable tolling are another important component of the "rights available in the courts" to private-sector employees. Congress intended that they also be available to federal employees, just as the right to trial *de novo*.

Divining congressional intent on this issue requires consideration of the language of the filing requirement, statutory structure and the policy behind the enactment. *See Zipes*, 455 U.S. at 393. Each of these elements supports the conclusion that the 30-day filing period for federal employees, just as its private-sector analogue, is not jurisdictional.[9]

1. First, the language of section 2000e-16(c) which sets forth the 30-day requirement is not mandatory in tone, nor does it speak in jurisdictional terms. It does not, for example, state that any civil action "must" be filed within 30 days, or that all claims "shall be barred" if not filed within 30 days. Rather, section 2000e-16(c) states that within 30 days an employee "may file a civil

[9] Three courts of appeals have concluded that section 2000e-16(c) is not jurisdictional. *Mondy v. Secretary of the Army*, 845 F.2d 1051, 1054-57 (D.C. Cir. 1988); *Martinez v. Orr*, 738 F.2d 1107, 1110 (10th Cir. 1984); *Milam v. United States Postal Service*, 674 F.2d 860, 862 (11th Cir. 1982). In addition to the Fifth Circuit, the Ninth Circuit has also held the provision to be jurisdictional, although that Court has not reexamined the issue in light of *Zipes*. *See Rice v. Hamilton Air Force Base Commissary*, 720 F.2d 1082, 1083-84 & n.1 (9th Cir. 1983). The Seventh Circuit has held that the time period for filing administrative charges in the federal sector is jurisdictional. *Sims v. Heckler*, 725 F.2d 1143, 1145-46 (7th Cir. 1984).

action." This language uses the same operative word "may" as the non-jurisdictional language in section 2000e-5(f)(1), which provides that within 90 days "a civil action may be brought."[10]

The language of 42 U.S.C. § 2000e-16, moreover, incorporates the filing provisions of the private sector, clearly establishing symmetry between the rights of federal employees to file civil actions and the rights afforded private-sector employees. Subsection (c) states that within 30 days of receipt of notice of final action an employee "may file a civil action *as provided in section 2000e-5 of this title*" (emphasis supplied). Similarly, subsection (d) of section 2000e-16 states that "[t]he provisions of section 2000e-5(f) through (k) of this title, as applicable, shall govern civil actions brought hereunder."

Section 2000e-16 thus explicitly references and incorporates its private sector counterpart, section 2000e-5

[10] The permissive language of section 2000e-16(c) is thus materially different from the language used in other limitations statutes this Court has construed where suits have been brought against the government. *E.g., United States v. Mottaz*, 476 U.S. 834 (1986) (28 U.S.C. § 2409a(f)—a civil action "shall be barred unless" commenced within twelve years); *United States v. Kubrick*, 444 U.S. 111 (1979) (28 U.S.C. § 2401(b)—"a tort claim against the United States shall be forever barred unless" it is timely presented to the agency); *Soriano v. United States*, 352 U.S. 270 (1957) (28 U.S.C. § 2401(b)—"every claim . . . shall be barred" unless filed within six years).

The language of section 2000e-16(c) also contrasts with the language of the CSRA, which governs actions in district court after a decision by the MSPB on a discrimination claim arising out of an individual personnel action within the Board's jurisdiction. *See King v. Dole*, 782 F.2d 274, 276 (D.C. Cir. 1986) (holding that 30-day time limit of 5 U.S.C. § 7703(b)(2) *is* jurisdictional because "clear and emphatic" language states that "[n]otwithstanding any other provision of law, any such case filed . . . must be filed within 30 days"), *cert. denied*, 479 U.S. 856 (1986); *but see Lee v. United States Postal Service*, 774 F.2d 1067, 1068 (11th Cir. 1985) (assuming without deciding that time limit in 5 U.S.C. § 7703(b)(2) is not jurisdictional by analogy to 42 U.S.C. § 2000e-16(c)).

(f)(1), which this Court has treated as non-jurisdictional. This Court reasoned in *Chandler v. Roudebush* that Congress incorporated the private-sector provisions because it intended for such provisions to govern in the public sector. "Since federal-sector employees are entitled by § 717(c) to 'file a civil action as provided in section 706 [42 U.S.C. § 2000e-5 . . .]' and since the civil action provided in § 706 is a trial *de novo*, it would seem to follow syllogistically that federal employees are entitled to a trial *de novo* of their employment discrimination claims." 425 U.S. 845-46. The same syllogism exists here. The adoption of private-sector filing procedures entitles federal employees to the equitable relief provided to other workers.

Finally, as in *Zipes*, the time-limit does not appear in the statutory provision governing the jurisdiction of the courts. *See* 455 U.S. at 394-95. In the private-sector provisions, the fact that the 90-day filing period (section 2000e-5(e)) was separate from the jurisdictional provision (section 2000e-5(f)) helped to establish the non-jurisdictional nature of the time limit. Again, the structure here is directly parallel. The 30-day time limit contained in section 2000e-16(c) is separate from section 2000e-16(d), the provision that defines the jurisdiction of the courts by cross-reference to section 2000e-5(f). *Accord Mondy v. Secretary of the Army*, 845 F.2d at 1056.

2. In addition to the statutory language and structure, the legislative history and policies of the Equal Employment Opportunity Act of 1972 also signal Congress' intention that the 30-day limit be interpreted in the same manner as the private-sector filing limit. Congress declared its intent to afford federal employees "the full rights available in the courts as are granted to individuals in the private sector under Title VII." S. Rep. No. 92-415, at 16. Congress was strongly committed to correcting the demonstrated history of discrimination in

federal employment, *id.*, and it perceived that full access to district court was a key means to that end.

The House Report, in fact, stressed the "paramount" importance of eradicating discrimination in federal employment, declaring that "there can exist no justification for anything but a vigorous effort to accord Federal employees the same rights and impartial treatment which the law seeks to afford employees in the private sector." H.R. Rep. No. 238, 92d Cong., 1st Sess. 22-23 (1971). Similarly, a key sponsor emphasized that "[p]reviously, there have been unrealistically high barriers which prevented or discouraged a federal employee from taking a case to court. This will no longer be the case. There is no reason why a federal employee should not have the same private right of action enjoyed by the individual in the private sector . . . ." (Statement of Senator Williams, *reprinted in* SENATE COMMITTEE ON LABOR AND PUBLIC WELFARE, SUBCOMMITTEE ON LABOR, LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, 92d Cong., 2d Sess. 1727 (Comm. Print 1972). *See also* Statement of Senator Cranston (section 717(c) "creates a remedy in Federal district court—comparable to private employment actions"). *Id.* at 1723.

Title VII provides the exclusive remedy for claims of discrimination in federal employment. *Brown v. General Services Administration*, 425 U.S. 820, 835 (1976). Given its declared intent to eradicate discrimination by *expanding* federal employees' access to the courts, it is inconceivable that Congress intended the unusually short 30-day time limit in the exclusive new scheme to operate as an absolute jurisdictional requirement.

An inflexible 30-day time limit on exercise of an employee's right to file a suit in district court would erect a formidable obstacle to enforcement of the Act. A "guiding principle" of Title VII is that "technical reading[s]" are " 'particularly inappropriate in a statutory scheme in

which laymen, unassisted by trained lawyers, initiate the process.' " *Zipes*, 455 U.S. at 397, *quoting Love v. Pullman*, 404 U.S. 522, 527 (1972). Such concerns are particularly important in the federal sector because the 30-day time limit is drastically shorter than the 90-day limit for filing suit in the private sector.[11] There is significantly less time for an employee to correct a mistake arising out of any of the accepted bases for equitable tolling such as inadequate notice, or wrong or misleading information from the employing agency. *See Baldwin County*, 466 U.S. at 151.[12]

Even absent these circumstances, 30 days is a difficult deadline for even the most diligent employee to meet. It is no easy task to secure counsel who is familiar with Title VII in general, understands its application in the federal bureaucracy in particular, and is willing to undertake a case despite the uncertainty of obtaining reimbursement for fees under the Statute. Yet, under the inflexible jurisdictional approach taken by the court below, even a pending motion for appointment of counsel would not save an employee's complaint from being dismissed.[13] *See Baldwin County*, 466 U.S. at 151.

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[11] There is no indication in the legislative history of the Act as to why Congress chose to make the time limit for federal employee suits 30 days.

[12] The provision of misleading information or inadequate notice is certainly not unheard of in the federal bureaucracy. *See, e.g., Miller v. Marsh*, 766 F.2d 490 (11th Cir. 1985); *Martinez v. Orr*, 738 F.2d at 1111.

[13] Indeed, under the law that governs in the federal sector, even a complainant who makes a good faith effort to file a complaint in district court on his own within 30 days stands a strong chance of being frustrated in that effort. One peculiarity of section 2000e-16(c) is its absolute requirement that the complaint name "the head of the department, agency, or unit, as appropriate" as defendant. As the Seventh Circuit has observed, "[t]his cryptic phrase provides little guidance to litigants." *Paulk v. Department of the Air Force*, 830 F.2d 79, 80 (7th Cir. 1987). *Accord Mondy v. Secretary of the Army*, 845 F.2d at 1052 n.1.

The byzantine system of rules and regulations governing the EEO complaints procedure in the federal sector provides many traps for the unwary. Victims of discrimination must navigate their way—often unrepresented—through a bewildering array of forums that can include a negotiated grievance-arbitration procedure, the EEOC, the MSPB, the Special Panel and the Court of Appeals for the Federal Circuit, as well as the district courts. As detailed above, *supra* pages 4, 7, the administrative agencies have generally made time limits subject to equitable modification, in recognition of the tortuous path an employee must follow and the many opportunities for missteps along the way. The remedial policies of the Act demand that the same accommodations be made in construing the statutory time limit applicable to the federal complainant who has persevered to the point of judicial filing.

3. The government attempts to use sovereign immunity principles to justify a statutory interpretation that has been rejected in the private sector. Given the statutory structure and policies discussed above, sovereign

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Rule 15(c) of the Fed. R. Civ. P. allows an amendment correcting the identity of the named defendant to "relate back" to the initial pleading only if the correct party received actual notice of the complaint within the applicable time period. *Schiavone v. Fortune*, 477 U.S. 21, 29 (1986). In a number of reported cases, Title VII complaints brought by federal employees have been dismissed because the employee named the incorrect individual as defendant and was not able to correct the error within the 30-day time period. *E.g., Harris v. U.S. Department of Transportation*, 843 F.2d 219 (5th Cir. 1988) (employee served his employer, the Coast Guard, but failed to name Secretary of Transportation); *Williams v. Army & Air Force Exchange Service*, 830 F.2d 27 (3d Cir. 1987) (employee named AAFES rather than Secretary of Defense); *Bell v. Veterans Administration Hospital*, 826 F.2d 357 (5th Cir. 1987) (employee named Veterans Administration Hospital rather than Administrator, Veterans Affairs).

immunity provides no support for construing the public-sector provision differently from a virtually identical provision in the private-sector law.

While it is a truism that the conditions under which the federal government consents to be sued must be "strictly observed," *e.g.*, *Lehman v. Nakshian*, 453 U.S. 156, 161 (1981), recitation of that principle does not advance the analysis here—it merely begs the question. As this Court has observed, waivers of sovereign immunity are not accomplished by a "ritualistic formula." Rather, "intent to waive sovereign immunity, and the scope of that waiver can only be ascertained by reference to underlying congressional policy." *Franchise Tax Board v. United States*, 467 U.S. 512, 521 (1984) (citations omitted). Congress clearly intended a broad waiver of sovereign immunity under Title VII, to make federal rights coextensive with those in the private sector. As demonstrated above, Congress chose language that is permissive in tone and parallels in every respect the non-jurisdictional time limit in section 2000e-5(f)(1).

From the cases construing that private-sector provision, we already know that the most natural reading is to construe the time-limit language as non-jurisdictional. This fact is virtually dispositive. Sovereign immunity does not justify a "strained and unnatural reading" of statutory language. *Chandler v. Roudebush*, 425 U.S. at 848. Rather, "the plain, obvious and rational meaning of a statute is always to be preferred," even where suit is being brought against the government. *Id.* (quotations omitted).

Such an approach is particularly appropriate here because Congress intended to provide federal employees with the same rights as workers in the private sector. One of the themes that "dominated the debates, proposals, and committee reports which preceded the enactment of the Equal Employment Opportunity Act of 1972" was "federal employees' lack of adequate internal safeguards

against employment discrimination and Congress' perception of their lack of access to the courts to raise claims of job discrimination." *Chandler v. Roudebush*, 425 U.S. at 848-49. The Senate Labor Subcommittee "found that an aggrieved Federal employee does not have access to the courts" in large part because "[i]n many cases the employee must overcome a U.S. government defense of sovereign immunity or failure to exhaust administrative remedies with no certainty as to the steps required to exhaust such remedies." S. Rep. No. 92-415 at 16. Congress amended Title VII to cover federal employees in 1972, precisely for the purpose of waiving the government's sovereign immunity so that federal employees would be given the same treatment as those in the private sector. Indeed, it was Congress' intent that the federal government would act as a model and set the example for employers in the private sector. *See* H.R. Rep. No. 92-238 at 24-25.

Congress thus manifestly intended to eliminate the sovereign immunity defense as a barrier to eradication of discrimination in the federal service and to the full exercise by federal employees of the rights enjoyed by private employees. While this Court is not empowered to extend a waiver of sovereign immunity beyond that which the legislature has contemplated, the Court also may not "assume the authority to narrow the waiver that Congress intended." *United States v. Kubrick*, 444 U.S. at 118, *citing Indian Towing Co. v. United States*, 350 U.S. 61, 68-69 (1955). As this Court has often repeated, "The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced." *E.g.*, *United States v. Mitchell*, 463 U.S. 206, 220 (1983); *Block v. Neal*, 460 U.S. 289, 298 (1983); *United States v. Yellow Cab Co.*, 340 U.S. 543, 554 (1951); *United States v. Aetna Casualty & Surety Co.*, 338 U.S. 366, 383 (1949), *quoting*

Anderson v. John L. Hayes Construction Co., 243 N.Y. 140, 147, 153 N.E. 28, 29-30 (1926).

As we have shown, the structure, history, and policy underlying the 1972 amendments to Title VII establish that Congress intended the 30-day time limit of section 2000e-16(c) to be subject to the same equitable principles as its private-sector counterpart. Congress, in fact, intended that sovereign immunity would not be interposed as an obstacle to promoting the remedial purposes of the Act and giving federal employees the same rights as other workers. The decision of the lower court frustrates that clear intent and merits reversal.

CONCLUSION

The decision of the court of appeals should be reversed and the cause remanded for further proceedings.

Respectfully submitted,

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